(1) Supreme Court, U.S.
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01-370 AUG 29 2001

NO. ——— OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM 2001

JASON RICHARDS and JEFFREY TERRELL,
Petitioners,

v.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI, OR ALTERNATIVELY, TO REINSTATE THE WRIT PREVIOUSLY GRANTED TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

WILLIAM J. BAXLEY
JOEL E. DILLARD
Baxley, Dillard, Dauphin
& McKnight
2008 Third Avenue South
Birmingham, Alabama 35233
(205) 271-1100

Attorneys for Petitioners
Jason Richards and Jeffrey Terrell

102 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Does the convoluted exemption scheme described by Alabama Chief Justice Moore's dissenting opinion below as creating "an unusually diverse class of exempt citizens, including lawyers, doctors, magicians, astrologers, and operators of hot dog stands" and by Associate Justice Johnstone as a scheme which "exempts a hodgepodge of categories of taxpayers while it does not exempt other virtually indistinguishable categories of taxpayers" warrant reversal of the Alabama Supreme Court's split decision in the case at bar, on federal equal protection grounds?

We contend that it does. This Court granted the writ on this issue in this case before, along with a *res judicata* issue which it decided in favor of petitioners here. *Richards v. Jefferson County,* 517 U.S. 793 (1996). But after granting the writ, this Court determined that neither the trial court nor the Alabama Supreme Court had addressed the merits of the equal protection claim and, on that basis, dismissed the writ as to this issue. *Richards,* 516 U.S. 1167 (1996). It is an issue that has now been decided, adversely to petitioners, by the Alabama Supreme Court. It is ripe for this Court's review, and this Court's decision in *Jefferson County v. Acker,* 527 U.S. 423 (1999) makes it clear that the Alabama Supreme Court's "business license" analysis below is flawed. This Court, in *Acker, supra,* found this tax to be an income tax, not a license tax. The lucky, who are exempt from paying this tax, are familiar to this Court by a list which appears in Justices Breyer's and O'Connor's appendix to *Acker, supra.*

II.

Does Jefferson County's peculiar enforcement of the same exemption scheme violate the equal protection clause of the Fourteenth Amendment, and does the Alabama Supreme Court decision below err in its application of federal law to the uncontradicted evidence?

We contend they do. The only member of the Jefferson County Commission participating in enactment of the tax in issue gave uncontradicted testimony that "at the time we considered the passage of the occupational tax, it was clearly irrational" and the record on appeal confirms this testimony. Preachers are not mentioned in the exemption scheme, or anywhere else, but, by fiat, those who are "ordained" ministers are exempt, and those who are not "ordained" are not. Some lawyers "not practicing law" are allowed an exemption on that basis (corporate "house counsel", for example) while others "not practicing law" are taxed (federal and state court judges, for example). Finally, many "licensed professionals" have been lumped in, for no good reason, with the average working men and women who pay the tax. Jefferson County's failure to exempt from its tax these "licensed" taxpayers is arbitrary, irrational and inexplicable. It has offered no rational explanation for these anomalies, in the record or otherwise. None exists.

III.

Does the conflict between the Alabama Supreme Court's decision here in issue and this Court's decision in *Acker, supra,* and its equal protection "rationality test" decisions cited below warrant a grant of the writ, and its reversal?

We contend that it does. These decisions speak for themselves.

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	Edwin A. Strickland Charles S. Wagner Jeffrey M. Sewell William Slaughter Charlie D. Waldrep Thomas L. Stewart
Petitioners' Counsel	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Trial Judge	Hon. John Rochester
Petitioners	Jason Richards Jeffrey Terrell and a class of similarly situated persons
Supreme Court of Alabama	Hon. Roy Moore (dissenting) Hon. J. Gorman Houston Hon. Jean Brown Hon. Champ Lyons, Jr. Hon. Bernard Harwood Hon. Lynn Stuart Hon. Douglas Johnstone (dissenting) Hon. Tom Woodall (recused) Hon. Harold See (recused)

No other persons are known to have participated directly in the appeal of this matter. Indirect participants in the appeal of this matter, due to consolidation of several appeals with the case at bar in the Alabama Supreme Court, Case Nos. 1990836, 1990923 and 1990961, are:

Plaintiff/Appellant	Phillip A. Triantos, M.D.
Counsel for Plaintiff/Appellant	E. Clayton Lowe, Jr. Wilson F. Green

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257 because this Petition is from a decision of the Supreme Court of Alabama in a civil case, and involves a federal constitutional question incorrectly decided by that Court.

(i) Date of the decision: June 22, 2001

(ii) No Application for Rehearing

(iii) No cross petition filed

(iv) Jurisdiction is based on 28 U.S.C. § 1257(1) and Rule 10.1(c) of the Rules of the Supreme Court.

(v) The Fourteenth Amendment to the *Constitution of the United States*, Section 1, provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition

On April 21, 1992, Jason Richards and Fannie Hill filed a class action complaint in state court, attacking the exemption scheme built into Jefferson County, Alabama's occupational tax. They claimed it denied them due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and under parallel provisions of the Constitution of Alabama. [Seven years later, in an unusual but decidedly local ruling, the Alabama Supreme

Court abolished the equal protection guaranty which it had recognized for decades to be part of the Alabama Constitution of 1901. *Ex Parte Melof,* 735 So.2d 1172 (Ala. 1999), *cert. den.* 528 U.S. 986 (1999)]

A motion for summary judgment, based upon a defense of *res judicata,* claimed to obtain as a result of a decision by the Alabama Supreme Court, *Bedingfield v. Jefferson County,* 527 So.2d 270 (Ala. 1988), was filed in the trial court on June 4, 1992.

On April 8, 1993, Jefferson County was granted summary judgment upon all state law claims, but summary judgment was denied as to petitioners' federal constitutional claims. (R. 392-394) Jefferson County and an intervenor tax recipient, Birmingham-Jefferson Civic Center Authority, appealed the trial court's denial of summary judgment upon these federal constitutional claims to the Alabama Supreme Court. (R. 425-428).

The Alabama Supreme Court reversed the trial court on this *res judicata* issue on March 31, 1995, and overruled petitioners' application for rehearing on June 9, 1995. *Jefferson County v. Richards,* 662 So.2d 1127 (Ala. 1995).

This Court granted certiorari on the *res judicata* issue, and also on the exact equal protection issue which is now embraced by this petition. *Richards,* 516 U.S. 983 (1995). But before oral argument, this Court determined that neither the trial court nor the Alabama Supreme Court had opportunities to address the merits of petitioners' equal protection claims, and on that basis dismissed the writ as improvidently granted. *Richards,* 516 U.S. 1167 (1996). This Court then reversed the Alabama Supreme Court's decision, *Richards,* 517 U.S. 793 (1996), and remanded the action for a trial on the merits of petitioners' federal equal protection claims.

On remand, the trial court entered an order certifying the *Richards* class on May 14, 1997 (R. 467-469) and, after

a trial, entered a declaratory judgment on November 12, 1998. The trial court held that the tax scheme here violates the United States Constitution because it contains exemptions which are "unfair, arbitrary and irrational" and because "it violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee." (R. 493-495) The same judgment also held that "the ordinance and statute in question each contain vague definitions which led to subjective interpretations and inconsistent enforcement of the tax." (R. 493-495)

Jefferson County perfected an appeal, and on June 22, 2001, the Alabama Supreme Court reversed the trial court, and held that the offending exemption scheme now before this Court passed federal constitutional muster. In doing so, the Alabama Supreme Court rejected this Court's factual interpretation of the same tax and exemption scheme set forth in *Jefferson County v. Acker,* supra. (This court held, in *Acker, supra* that: "In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as license taxpayers." 527 U.S. at 440.)

This petition seeks review and reversal of the Alabama Supreme Court's most recent decision. [See *Richards,* 662 So.2d 1127 (Ala. 1995); 682 So.2d 409 (Ala. 1996); 710 So.2d 908 (Ala. 1998); 767 So.2d 343 (Ala. 2000)]

(II) Statement of Facts with References to Record

The county taxing ordinance appears in the appendix and the record (R. 30-31). It is necessary to refer to the

Code of Alabama, cited within it, to locate the list of persons and businesses which are exempt from the tax, but they are conveniently collected not only in Justice Maddox's dissenting opinion in the Alabama Supreme Court decision this Court reversed in 1995 [*Richards v. Jefferson County,* 662 So.2d 1127 (Ala. 1995), at Footnote 1] but also in Justices Breyer's and O'Connor's 1999 Appendix to *Acker,* 527 U.S. at 423.

In 1992 Jason Richards, a law firm courier, and Fannie Hill (who was replaced by Jeffrey Terrell), together represented a class of claimants attacking the Jefferson County Occupational Tax's exemption scheme. Their complaint appears in the appendix and the record on appeal. (R. 1-18). They made a specific claim that "this action involves a violation of federal law for which 42 U.S.C. § 1983 provides a remedy" (R. 2) and alleged that "[t]he occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants in private homes." (R. 8) A complete and staggering list of exempted callings appears in the text of argument below. Richards and Hill complained that "[b]y its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes." (R. 8) Richards and Hill also complained that "the net effect, dollarwise, of the

occupational tax is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would otherwise be levied at more than ten times the amount of the license fee paid by these high income professionals" (R. 9) and concluded that "[t]he array of persons subject to the tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and . . . [t]he array of persons subject to the occupational tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which fall within and without the burden of the occupational tax render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. 9) Finally, they claimed that "the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action." (R. 14).

At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of "loopholes" for a "sizeable number of professions, with no apparent rationale." (Tr. 32) The only commissioner available at trial who was present when the tax was enacted testified: "I would have had a hard time determining what sleight of hand artists, psychic healers, playing card salesmen and lawyers have in common. There is no rationale." (Tr. 39)

The County's Director of Revenue admitted, when called as a hostile witness, that the $10 annual fee embalmers pay to avoid the tax does not go to, or benefit, Jefferson County. (Tr. 46) He also admitted that fire-

works dealers pay nothing to Jefferson County and are completely exempt from paying its occupational tax. (Tr. 47) Fortune tellers, clairvoyants, astrologers, crystal ball gazers, and junk yard operators pay nothing to the county and are completely exempt. (Tr. 48-49) He characterized a group of sole proprietors whose businesses are incorporated as falling within a "taxed twice" group which he considers to be "a peculiar thing". (Tr. 53) Real estate salesmen and insurance agents pay no license fee to the state or the county, but are also strangely exempt from paying the occupational tax. (Tr. 56) Similarly, he admitted that accountants, lawyers, dentists, and engineers pay nothing to the county and enjoy complete exemptions. (Tr. 61-62) Another group of professionals — dental hygienists, electrical contractors, nurses, and psychologists pay state license fees but are strangely required to pay the occupational tax, as well. (Tr. 64-67) "Preachers and ministers" are nowhere mentioned in the occupational tax or its exemption scheme, but the county has decided to exempt them nevertheless, if they are "ordained" but not otherwise. (Tr. 80) He admitted sharp income disparities by and between dentists, who are exempt, and their hygienists, who are not (Tr. 85), and that before this suit was filed the County erroneously "exempted" security guards and barbers who, like ministers, are not mentioned in the exemption scheme. (Tr. 92)

Nurses testified, and their licenses were introduced into evidence, along with proof that they pay the occupational tax. (Tr. 98-112) A geologist did likewise. (Tr. 115-124) Investment brokers, administrative officers, teachers, police officers, and real estate appraisers gave similar testimony about the ways in which they were considered professionals or paid actual license fees to the state, but were somehow left out of the group which enjoys total exemption. (Tr. 128-191)

The current President of the Jefferson County Commission testified: "The only reason we're being sued is the inequality of the tax . . . we can't do without the tax now and the only options are to do away with it or make it fair. As far as the Commission is concerned, that's our only two options, since we can't change the law." (Tr. 217-222) She concluded her testimony on this note: "It is my hope that the Legislature will apply the law equally — the tax equally to everybody." (Tr. 241)

For the county Dr. Ira Harvey, a history professor, gave testimony tracing the history of taxation in Alabama, then conceded, with respect to the Jefferson County Occupational tax: "I am not offering testimony on this particular tax today." (Tr. 364) One important colloquy involving this history expert's testimony warrants inclusion here:

> Q: So you've got no opinion then that you're offering about the rationality or the rational basis for the Jefferson County Occupational tax or the license code of Jefferson?
>
> A: No. (Tr. 367)

No expert witness testified that the county's exemption scheme was rational. But it's irrationality was addressed by the State Medical Examiner Board Director, who admitted that no fees paid to his agency go to the county (Tr. 383), and by the State Real Estate Commission Director, who admitted that none of his agency's fees go to the county.

The county's chief financial officer testified that Jefferson County pays $10,000,000 annually to the Birmingham-Jefferson Civic Center, a party intervening in this action. (Tr. 409) He also testified that the County had enough money left over after these payments to buy a $50,000,000 private hotel. Tr. (415) The county's finance director testified at length about his job and the

records he keeps, and was cross-examined at length about the county's financial health — testimony which may be relevant at some point to a remedy phase of this action, but is not germane to the issues now before this Court. (Tr. 459-551) The county attorney gave an opinion that the purpose of the tax is to raise revenue and exercise police power. (Tr. 554) He admitted that many ministers simply quit paying the occupational tax after doing so for years, and that the county did nothing to attempt to enforce the tax against them on "complicated legal uncertainty" grounds. (Tr. 578) He described his decision to apply the tax to Judges Acker and Clemon (and the rest of their brothers and sisters on the bench) of the United States District Court for the Northern District of Alabama as having been made on a "fish or cut bait" basis because they do not "practice law." (Tr. 580) But corporate "house counsel" who do not practice law are inexplicably allowed to evade the tax. (R. 598-601) The County offers no coherent explanation for this disparity. (R. 598-601)

ARGUMENT

(I) Scope of Review

Richards and Terrell, who are not members of a suspect or quasi-suspect class, must establish that the exemption scheme attacked here as violative of the Fourteenth Amendment fails this Honorable Court's "minimum rationality" test for tax exemption. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985).

(II) Amplification of Reasons for Allowance of Writ

The Irrational Exemption Scheme In Issue Here Is Unconstitutional On Its Face

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any

person within its jurisdiction the equal protection of the laws. *Nordlinger v. Hahn*, 505 U.S. 1 (1992). And while the Equal Protection Clause does not forbid reasonable classifications, it does keep governmental decisionmakers from treating differently persons who are in all relevant respects alike. *F. S. Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), *Plyler v. Doe*, 457 U.S. 202 (1982), *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). And even where — as here — persons discriminated against do not fall in a suspect or quasi-suspect classification, the Equal Protection Clause forbids irrational means to serve legitimate ends. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985).

This Honorable Court tersely summarized application of the Fourteenth Amendment to the case at bar in the *F. S. Guano case, supra:*

> But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

253 U.S. at 412.

This rationality test has been held to specifically apply to tax exemption schemes. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). It also applies, of course, to other taxation disparities which are irrational and arbitrary. *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936); *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923). See also, *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918).

By this petition, we respectfully invite this Honorable Court to revisit its decisions forbidding discriminations arbitrarily and irrationally imposed upon Vietnam War veterans who were newcomers to a state, when none were

suffered by their more tenured counterparts, *Hooper, supra;* forbidding application of arbitrary distinctions to recent real property purchasers, because the same distinctions were not applied to others who managed to hold onto real property for a while longer, *Allegheny Pittsburgh Coal Company, Inc. v. County Commission of Webster County, West Virginia,* 488 U.S. 336 (1989); forbidding unequal application of zoning laws to disabled group home residents, when their better advantaged neighbors evaded them, *Cleburne, supra;* rejecting Alabama's attempt to impose higher rates of taxation upon foreign corporations than were imposed upon their domestic counterparts, *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 (1984); striking down irrational and wholly arbitrary discriminations in water supply easement ordinances, *Village of Willowbrook, supra;* and striking down discriminations against recently arriving Alaskans seeking state oil reserve dividend distributions, where their neighbors with longer periods of residency were treated more favorably, *Zobel v. Williams,* 457 U.S. 55 (1982). See also, *WHYY v. Borough of Glassboro,* 393 U.S. 17 (1968). We then petition it to grant a writ of certiorari, and declare that Jefferson County's convoluted, nonsensical, cockamamie exemption scheme cannot stand. It is a bizarre scheme which is set forth in Justice Breyer's and Justice O'Connor's opinion in *Jefferson County v. Acker, supra.* It completely exempts:

> utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine and comptrometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auction-

eers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply and mining supply brokers and agents; broom, brush and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortune-tellers, palmists, clairvoyants, astrologers, phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lightning rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists,

bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe and cafeteria operators; roadhouses, nightclubs and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers (See Code of Alabama 1975, Legislative Manuscript Volume 6, Title 40, Chapter 12 and Ordinance 1120 at R. 33).

Meanwhile, Jefferson County levies its tax upon average wage earners, laborers and all other persons who are not included in the above captioned list, many of whom pay license fees but were omitted — without explanation or rationale — from its list of exemptees. The exempt pay

paltry license fees (for example, five dollars for manicurists and twenty five dollars for neurosurgeons), by and large, to dodge the occupational tax altogether. But some star crossed callings and professions (nurses, geologists, investment brokers, teachers and real estate appraisers) pay state license fees but are required to pay the occupational tax, as well, because they were somehow omitted from the favored list. We respectfully submit that it is impossible for Jefferson County or for the State of Alabama to articulate a rational basis for exempting doctors and lightning rod installers, dentists and fortune tellers, attorneys and crystal ball gazers, and neurosurgeons and dog and pony show operators, to name but a few, from a substantial occupational tax while imposing the same tax on working stiffs like Richards and Terrell, and upon the licensed callings and professions that somehow didn't make the list. And no preachers have any rational basis for evading taxation, whether ordained or not, but some do. Preachers who don't evade this tax are discriminated against on an "ordination" basis which Jefferson County has established on a completely arbitrary and irrational basis.

This exemption scheme could not be more irrational or arbitrary if it also exempted left handed men with freckles or green eyed women who refuse to eat broccoli. It goes far beyond the irrationality bounds this Honorable Court declared to be the line of demarcation between constitutional and unconstitutional classification in *F. S. Guano, Allegheny Pittsburgh, Cleburne, Hooper, Metropolitan Life, WHYY, Village of Willowbrook, Sioux City Bridge Company, Mayflower Farms* and *Zobel, supra.* Chief Justice Moore of the Alabama Supreme Court and Associate Justice Johnstone were right to condemn it as violative of the United States Constitution. Without this Court's intervention, their enlightened views will, for all practical purposes, be buried with the petitioners claims.

Jefferson County's Enforcement of the Tax is Unconstitutional

If Jefferson County could do the impossible, and articulate a rational basis for its exemption of the odd group it has chosen to evade taxation, its enforcement of the tax would nevertheless violate the equal protection clause. This Court addressed the gravity of the County's "ordained" minister problem (How does a Muslim cleric or a tent evangelist obtain ordination? Jefferson County doesn't have a clue), its "practicing law" problem (How can the county attorney maintain a straight face claiming that corporate house counsel who are not "practicing law" are different from the federal judges, who do not practice law, but whom he refuses to exempt? He cannot.), and its business license distinction without a difference problem (How are nurses and geologists, who pay the same license fees to the state that others who are exempt pay, different in any rational way from them? They are not.) recently, per curiam, in *Village of Willowbrook, supra:*

> [W]e have explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents."* (Citations omitted, emphasis supplied).

528 U.S. at 564

The Alabama Supreme Court Cannot Overrule This Court's Decistion in Acker, Supra.

Undeterred by this Court's clear ruling, in *Acker, supra,* that for federal law analysis the tax here in issue is an income tax and not a business license tax, a majority of the Alabama Supreme Court elected to treat it as a business

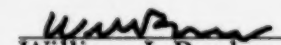
license tax anyway, and to ignore Jefferson County's improper execution — through its constituted agents — of its power to tax and its power to exempt from taxation. In doing so, this majority of the Alabama Supreme Court overruled, *sub silentio,* this Court's decision in *Acker, supra.*

CONCLUSION

This Court has already considered Jefferson County's occupational tax more than once. In 1996 in *Richards, supra,* this Court granted the petition for certiorari filed by these very same petitioners challenging this very same ordinance for its unequal, irrational and unconstitutional exemption scheme. At that time, this Court quite properly decided not to consider the apparent equal protection violation in order to defer to the Supreme Court of Alabama and to give it the opportunity to speak first on the subject. But, before the Supreme Court of Alabama got around to speaking, this Court, in 1999 in *Acker, supra,* looked again at the ordinance. There, this Court, if it did nothing else, made it plain that for the purposes of federal constitutional analysis, Jefferson County's ordinance is an income tax, albeit a very strange one. This Court said absolutely nothing to suggest to the Supreme Court of Alabama or to Jefferson County that this bizarre ordinance, for the purposes of an examination under the Equal Protection Clause, is nothing but a licensing scheme that, with impunity, can discriminate between vocations on the basis of some intuited public policy favoring certain vocations over others. When the Supreme Court of Alabama finally got around to addressing the equal protection question, five of its justices looked for a way to escape the inevitable glare of the Equal Protection Clause and of this Court. Petitioners respectfully suggest that now is the time for this Court to

put Jefferson County's fatally flawed ordinance beyond resurrection with a dispositive ruling that cannot be misunderstood or ignored. The constitutional issue that was rightfully postponed in 1996 is now overripe.

Respectfully submitted,



William J. Baxley

Joe E. Dillard
Attorneys for Petitioners
BAXLEY, DILLARD,
DAUPHIN & McKNIGHT
2008 Third Avenue South
Birmingham, Alabama 35233
(205) 271-1100

APPENDIX

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1981680

Jefferson County and Birmingham-Jefferson Civic Center Authority

v.

Jason Richards et al.

Appeal from Jefferson Circuit Court
(CV-92-3191)

1990836

Jefferson County

v.

Phillip A. Triantos, M.D.

Appeal from Jefferson Circuit Court
(CV-99-4812)

1990923

Jason Richards and Jeffrey Terrell

v.

Phillip A. Triantos, M.D.

Appeal from Jefferson Circuit Court
(CV-99-4812)

1990961

Phillip A. Triantos, on behalf of himself
and a certified class of persons

v.

Jefferson County, Alabama

Appeal from Jefferson Circuit Court
(CV-99-4812)

PER CURIAM.

These appeals arise from, or are related to, a class action filed against Jefferson County by certain county taxpayers, referred to herein as the *Richards* class. The *Richards* class members claim that an occupational tax, as currently authorized by Ala. Acts 1967, Act. No. 406 (Reg. Session) (not codified), and implemented by Jefferson County Ordinance No. 1120, violates the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. The equal-protection claim asserted by the *Richards* class stems from the fact that another group of taxpayers, referred to herein as the

Triantos class, or the "exempt" class, are exempt from payment of the tax, under the mandate of Act No. 406 and under the express language of Ordinance No. 1120.

The overarching issue presented in this group of appeals is whether the Equal Protection Clause of the Fourteenth Amendment mandates that all professions and occupations be treated the same by the State of Alabama and by Jefferson County for occupational-tax purposes. Stated more specifically, the primary issue presented is whether the exemptions from Jefferson County's occupational tax, granted to certain professions and occupations by Act 406 and implemented by Ordinance No. 1120, violate the Equal Protection Clause. We hold that the *Richards* plaintiffs have failed to meet their burden of proving that the exempt classifications at issue violate the Equal Protection Clause.

CASE NO. 1981680

The plaintiff class in *Richards v. Jefferson County et al.* (Case No. 1981680), filed their action in 1992, seeking a judgment declaring Jefferson County's occupational tax unconstitutional. Judge John E. Rochester entered a judgment on November 12, 1998, holding that the exemptions required by § 4 of Act 406 and allowed by Section 1(B) of Ordinance No. 1120 violate the Equal Protection Clause. On June 17, 1999, Judge Rochester entered an order enjoining the County from continuing to collect the occupational tax from the members of the *Richards* class unless it also collected the tax from the members of the *Triantos* class. Pursuant to that order, Jefferson County began collecting tax from the *Triantos* class members; also pursuant to Judge Rochester's order, the County placed those newly collected funds in a special escrow account. Jefferson County appeals from Judge Rochester's order of June 17, 1999.

CASE NO. 1990836

Case No. 1990836, an appeal styled *Jefferson County v. Phillip Triantos, M.D.*, arises out of a class action filed by a Birmingham physician, Dr. Phillip Triantos, against Jefferson County after the County had begun collecting the occupational tax from the exempt taxpayers. Triantos sought a judgment declaring that Jefferson County had no authority to impose the occupational tax on the exempt taxpayers and an injunction prohibiting Jefferson County from collecting the occupational tax from the exempt taxpayers; he also sought a refund of all occupational taxes that had been collected from the exempt taxpayers.[1] Judge Thomas Woodall (who is now a Justice on this Court) heard the action and issued the requested declaratory judgment and the requested injunction, finding no lawful basis under which the County could impose the occupational tax on the members of the *Triantos* class because the 1967 Act conferred no such taxing authority on Jefferson County.[2]

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[1]This issue gave rise to a separate appeal that is addressed later in this opinion, under the heading "Case No. 1990961."

[2]In 1999, the Legislature purported to repeal Act No. 406 (1967) by adopting Act No. 99-406 and Act No. 990-669. However, Act No. 99-406 was declared unconstitutional by Judge Woodall in *Triantos v. Jefferson County*. Act No. 99-669 was declared invalid in *Jefferson County Employees' Association et al. v. Jefferson County, Alabama et al.* (CV-00-0297), by Circuit Judge William A. Jackson. These issues are not before this Court in these appeals.

In the Regular Session for the year 2000, the Legislature again purported to repeal Act No. 406 (1967). It enacted Act No. 2000-215 to provide for a new occupational tax in Jefferson County. However, in yet another legal challenge to the constitutionality of Jefferson County's occupational tax, Judge Woodall declared Act No. 2000-215 invalid because of legislative procedural deficiencies. *See Izzi v. Jefferson State Cmty Coll. et al.* (CV-00-1768). Appeals from this litigation are pending before this Court as Case No. 1000150 and Case No. 1992027.

Jefferson County filed a "Motion to Alter, Amend or Stay," seeking a stay of Judge Woodall's injunction pending on appeal. Although Judge Woodall denied the motion, this Court, on March 22, 2000, granted the stay. By virtue of this stay, Jefferson County continues to collect the occupational tax from both the *Richards* class and the Triantos class of taxpayers.

CASE NO. 1990923

Case No. 1990923 arises out of a motion to intervene filed by the *Richards* plaintiffs in the *Triantos* action. The *Richards* plaintiffs sought to intervene in order to have the 1967 Act and the Ordinance declared unconstitutional, a position contrary to that being asserted by the exempt taxpayers in the Triantos action. Judge Woodall denied this motion, and the Richards plaintiffs appeal.

CASE NO. 1990961

Case No. 1990961 arises from Judge Woodall's order in the *Triantos* action denying Dr. Triantos's request for a refund of all occupational taxes paid by the members of the exempt class. Judge Woodall deferred any ruling on the refund issue pending further orders in the *Richards* action regarding the escrow account in which the taxes collected from the exempt taxpayers were deposited. Triantos filed a "Motion to Alter or Amend," arguing that the *Richards* court lacked jurisdiction over the *Triantos* class and that the *Triantos* class should not be compelled to seek their refund in the *Richards* action. Judge Woodall denied this motion; Triantos appeals.

ISSUES PRESENTED ON APPEAL

We consider the following issues on appeal:

1. Whether Judge Rochester's order issued in *Richards v. Jefferson County* is an appealable order.

2. If the order entered by Judge Rochester in *Richards et al. v. Jefferson County* is an appealable order, what is the appropriate standard of review to be applied in that appeal?

3. Whether the exemptions mandated in Act 406 (1967) and allowed in Ordinance No. 1120 are unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

4. If this Court determines the exemptions mandated in Act 406 (1967) and authorized by Ordinance No. 1120 to be constitutional, whether Judge Woodall's order entered in *Triantos v. Jefferson County,* in which he enjoined Jefferson County's collection of the occupational tax from the exempt group of taxpayers, should be affirmed and whether this Court's stay of Judge Woodall's order should be lifted.

5. Whether the *Richards* class members were entitled to intervene, either as a matter of right or permissively, in the *Triantos v. Jefferson County* action.

6. If Jefferson County's collection of the occupational tax from the *Triantos* class is unconstitutional, what is the appropriate remedy?

DISCUSSION

We summarily dispose of issues 1, 2, and 5. As for the first issue, it cannot be seriously disputed that Judge Rochester's order of June 17, 1999, in which he restrained Jefferson County from collecting an occupational tax from the *Richards* class members unless it also collected the tax from the *Triantos* class members, is an appealable order. As correctly argued by Jefferson

County, Judge Rochester's order is both a mandatory injunction[3] and a prohibitory injunction.[4] Rule 4(a)(1)(A) of the Alabama Rules of Appellate Procedure authorizes an appeal from an "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction." Judge Rochester's June 17, 1999, order is appealable.

We next determine the appropriate standard of appellate review to be applied to Judge Rochester's ruling that the exemptions at issue in this case violate the Equal Protection Clause. Jefferson County asserts that the proper review is a *de novo* review, with no presumption of correctness, because this appeal raises a federal constitutional issue and because any findings of fact made by Judge Rochester are intimately intertwined with that constitutional law. The *Richards* plaintiffs argue that the "clearly-erroneous" standard is the applicable standard because Judge Rochester made findings of fact based on evidence presented to him *ore tenus*. The *Richards* plaintiffs assert that, on appeal from a trial court's determination that a statute or ordinance violates the Equal Protection Clause, an appellate court must apply the "facts" as determined by that trial court.

Alternatively, Jefferson County asserts that, even if the clearly-erroneous standard is the proper standard to be applied, Judge Rochester applied erroneous legal principles in his orders. The *Richards* plaintiffs argue that Judge Rochester correctly applied the law to the findings of fact contained in his order.

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[3]*Black's Law Dictionary* 788 (7th Ed. 1999) defines "mandatory injunction" as "[a]n injunction that orders an affirmative act or mandates a specified course of conduct."

[4]*Black's Law Dictionary* 788 (7th ed. 1999) defines "prohibitory injunction" as "[a]n injunction that forbids or restrains an act," and staets "This is the most common type of injunction."

Judge Rochester's November 12, 1998, order states, in pertinent part:

> "The Court has considered the evidence, argument, and pleadings in this matter, along with the applicable statutes, ordinance and case law. After a consideration of same, the Court finds that Section 4 of Alabama Act 406 (1967) and Section 1(B) of Jefferson County Ordinance 1120 (1987) are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:
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> "1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.
>
> "2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.
>
> "3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.
>
> "4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of taxpayers who must bear the sole burden of providing occupational tax dollars for the County.
>
> "5) The exemptions are arbitrary, unfair and irrational.

It is significant to note that no real dispute exists regarding the underlying facts. The parties do not dispute the validity of the Act or the Ordinance, other than as to the constitutionality of the exemptions found therein. Nor is the evidence that was presented to Judge Rochester of the type that is subject to serious factual debate. The evidence presented to Judge Rochester included testimony from various Jefferson County taxpayers as to their professional or vocational status, their tax status, and whether they believed that tax status to be fair or unfair; the testimony of an academician (who formerly served as the assistant director of finance) regarding the legislative foundation of Act 406; the testimony of various former county officials as to their understanding of the background of Ordinance No. 1120; and testimony from current Jefferson County officials regarding Jefferson County's tax-collection efforts.

Further, the only findings of fact made by Judge Rochester addressed the ultimate constitutional issue presented for decision — whether the exempt classifications mandated by Act 406 and authorized by Ordinance No. 1120 are so unreasonable, arbitrary, and capricious as to violate the Equal Protection Clause. We find the observations of the United States Court of Appeals for the First Circuit, in *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975), another case involving an equal-protection challenge, to be directly on point:

> "The parties were evidently of the opinion that the district court's assessment of the relevant physical differences between boys and girls, as well as its conclusion that these differences provided 'rational' support for Darlington's exclusion of girls, were findings of fact within the meaning of Fed. R. Civ. P. 52(a). It was argued that if there is substantial evidence in the record supporting them, we must affirm.

> However, assessing such matters is not like reviewing a judgment in a personal injury case. The facts themselves, sometimes labelled 'legislative' or 'constitutional' facts, are not 'provable' in the usual sense and are part and parcel of the constitutional judgment we ourselves must make. Cf. *Drope v. Missouri,* 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (quoting *Watts v. Indiana,* 338 U.S. 49, 51, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949)); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes,* 49 Harv. L. Rev. 631, 638-39 (1936)."

514 F.2d at 348-49. See also *Brasselt v. Cota,* 761 F.2d 827 (1st cir. 1985) (recognizing that an appellate court reviewing a constitutional issue is not bound by clearly-erroneous standard of review and must conduct an independent review of facts); *Pinnell v. Board of County Comm'rs,* 127 N.M. 452, 982 P.2d 503 (N.M. Ct. App. 1999) (reviewing equal-protection challenge of county resolution under *de novo* standard); *People v. Pitts,* 222 Mich. App. 260, 564 N.W.2d 93 (1997) (reviewing equal-protection challenge of statute under *de novo* standard).

As did the First Circuit Court of Appeals in *Fortin,* supra, we conclude that any factual issues presented for resolution are "part and parcel of the constitutional judgment we ourselves must make." *Id.* at 348-49. Because it is the duty of this Court to resolve the constitutional issues presented to it, and any factual questions presented are "part and parcel" of the constitutional issues, we review all issues *de novo.* Additionally, because we conclude that our review of Judge Rochester's ruling is a *de novo* one, we need not address, at this point in the opinion, the issue whether Judge Rochester applied erroneous legal principles in his order.

As for the fifth issue, we hold that the procedural posture of these appeals renders moot the appeal by the *Richards* class from the denial of its motions to intervene

in the *Triantos* action. As stated above, we review the constitutional issues under a *de novo* standard, giving no presumption of correctness to the findings of fact made by Judge Woodall. In addition, we note that all parties with an interest in these actions are now before this Court or were allowed an opportunity to appear before it. The taxpayers that are expressly subject to the occupational tax (the *Richards* class), the taxpayers that are expressly exempt from the occupational tax (the *Triantos* class), and the taxing authority (Jefferson County), have presented to this Court their arguments, both orally and in briefs, on the issues raised in each of the four appeals. As a result, the *Richards* class members have not suffered, and will not suffer, any prejudice from the denial of their motions to intervene in the *Triantos* action. We express no opinion on the merits of those motions; we simply find that the procedural posture of these appeals makes it unnecessary for us to consider those motions.

We now turn to the substantive issues. The central issue presented in this group of appeals is whether the Fourteenth Amendment to the Constitution of the United States mandates that all professions and occupations be treated the same by Jefferson County for tax purposes. The specific issue presented is whether the exemptions from Jefferson County's occupational tax, granted to certain professions and occupations by Act 406 and by Ordinance No. 1120, violate the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has addressed the constraints placed on the judiciary in reviewing an equal-protection challenge of this nature. In *Plyer v. Doe,* 457 U.S. 202, 216 (1982), the Court stated:

> "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas,* 310 U.S. 141, 147 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."

Having noted these guiding principles, we return to the constitutional issue before us with a sharper focus of the proper inquiry: Whether Jefferson County's classification of professions and occupations into different taxation categories bears some fair relationship to a legitimate public purpose. If the challenged classification bears a fair or rational relationship to a legitimate or proper public purpose, then our inquiry into the constitutional issue presented in these appeals need go no further.

BACKGROUND OF ACT NO. 406, ALA. ACTS 1967 (REG. SESS.), AND ORDINANCE NO. 1120

The Legislature enacted Act No. in 1967 with the stated purpose of "equaliz[ing] the burden of taxation by authorizing the county to impose a license or privilege

tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county." Act No. 406, § 3. That Act authorized, but did not require, counties with populations greater than 500,000 to do the following:

> "[T]o levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended."

Article 1, Chapter 20, Title 51, as amended, refers to the general licensing fees imposed by the State of Alabama upon certain businesses and professions; Sections 176, 177, 178, 180, 182, 183, 184, and 186 in Title 51 of the Code of Alabama of 1940, as amended, refer to the license taxes imposed by the State of Alabama upon public utilities operating within the State of Alabama; Section 429 in Title 51 of the Code of Alabama of 1940, as amended, refers to the excise taxes imposed by the State of Alabama upon financial institutions; and Section 826 in Title 51 of the Code of Alabama of 1940, as amended (now repealed), refers to the fees and taxes imposed by the State of Alabama upon insurers. Thus, in summary, Act 406 authorizes, but does not require, a qualifying county to impose a license tax upon any person engaged in a business but not already paying a license tax to the State or County under the specified Code sections.

In 1968, Jefferson County exercised the taxing authority granted to it by Act 406 by enacting a General Licensing Code. In 1987, Jefferson County again exercised this taxing authority by enacting Ordinance No. 1120, which imposed an "occupational license tax" (referred to herein simply as an "occupational tax"), in the amount of

one-half percent (1½%) of the gross receipts earned within Jefferson County by every person engaged in a "vocation, occupation, calling or profession," as defined in the Ordinance. The words "vocation, occupation, calling or profession" were defined in the Ordinance as follows:

> "(B) The words 'vocation, occupation, calling and profession' shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, *but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended."*

(Emphasis added.) The Code sections referenced in Ordinance No. 1120 are the corresponding Code sections referred to in Act No. 406, as renumbered upon their transfer from the 1940 Code to the 1975 Code. Thus,

under the express language of the Jefferson County Ordinance, the occupational tax applies to every person working within the County, with the exception of those persons engaged in professions or occupations for which license fees are required to be paid under any of the Code sections set forth in the Ordinance, which are the same Code sections set forth in Act 406.

However, these are not the only persons exempt from payment of the occupational tax. Jefferson County interprets Ordinance No. 1120 to exempt the following classes of persons from payment of the occupational tax under Ordinance No. 1120: (i) individuals engaged in certain professions and occupations who are required to pay state license fees and are expressly protected by state law from county taxation; (ii) individuals who do business as sole proprietorships and pay taxes to the County under its general business-license code; (iii) individuals who do business as sole proprietors and pay taxes under the state license code, which in most instances includes a piggyback tax to the County; (iv) persons employed as domestic workers in private homes; and (v) persons employed as ordained ministers.

CASE NO. 1981680

The *Richards* class contends that the Jefferson County Ordinance

> "clearly frustrated its very purpose, and did so [in] seven separate ways, because it:
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> "1) Assembles a comical, ridiculous hodgepodge of exempted callings which is so absurd that it violates the United States Constitution's Equal Protection rationality test on its face . . . ;
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> "2) Imposes percentage rates of taxation on non-exempt wage earners which are substantially and irrationally greater

than comparatively paltry license fees paid by high income, licensed 'professionals' who are exempt from paying the tax;

"3) Grants 'preachers,' who are not exempted from the tax, exemption nevertheless, and then on a case-by-case basis arbitrarily and irrationally picks and chooses exemption status for some, but not all, preachers;

"4) Selects businesses rather than individuals for tax exemption in a manner which irrationally allows sole proprietors exemption from the tax while their otherwise identical counterparts pay it;

"5) Through error or oversight simply fails, irrationally, to include within the exempted class a broad array of state regulated 'professionals' licensed under Title 34 of the State Code — including, among others, nurses, real estate appraisers, dieticians, podiatrists, and any [sic] others;

"6) Arbitrarily and irrationally omits from the exemption list non-licensed professions which nevertheless adhere to training and certification standards and fees equal to or greater than those exempted, including teachers and police officers;

"and

"7) Irrationally equates license fees which are paid exclusively to the State, thereby conferring no benefit whatsoever upon the County, with payments to Jefferson County."

However, we find no merit in these arguments to invalidate Ordinance No. 1120 or Act No. 406 on equal protection grounds. As addressed below, we conclude that the exempt classifications created by Act No. 406

and by Ordinance No. 1120 bear a fair relationship to a legitimate public purpose. It has long been recognized that the legislature has the authority to create classifications for legislative purposes.

> "No question is or could be made . . . as to the right of a state, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. 'Equal protection' does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it . . . .' 'The rule of equality permits many practical inequalities.' 'What satisfies this equality has not been and probably never can be precisely defined.'
>
> "The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states. A state may exercise a wide discretion in selecting the subjects of taxation 'particularly as respects occupation taxes.'"

New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578-79 (1938) (citations omitted). Time and time again, this Court has embraced these very principles in addressing constitutional challenges to state and local legislative action. For example, in *State ex rel. Attorney General v. Spann,* 270 Ala. 396, 118 So. 2d 740 (1959), this Court upheld a statute requiring the licensing of architects, stating:

> "We believe that it is within the discretion of the legislature to determine at what point licensing is to begin and at what point it shall end.
>
> . . . .
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> "We cannot say that we know all the reasons for the classifications under the act in question. This is not necessary however. It is within the scope of legislative authority to make classifications in its regulatory enactments. Unless clearly and patently arbitrary, oppressive and capricious on its face, such classification is not subject to judicial review. Mere inequality under such classification is not sufficient to invalidate a statute."

270 Ala. at 400, 118 So. 2d at 743.

Again, in *Jolly v. City of Birmingham,* 55 Ala. App. 603, 318 So. 2d 300 (1975), the Court of Civil Appeals upheld a municipal ordinance that imposed an occupational license tax. In so holding, it recognized:

> "[I]t is only blatantly arbitrary and unreasonable classifications which will sustain [an equal protection] claim for taxation purposes.
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> . . . .
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> ". . . [I]nconsistent enforcement of an ordinance constitutes no argument against the power to pass it."
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> "Appellant urges that a discriminatory condition is created by the fact the occupational tax imposes a greater burden upon those subject to it than upon those subject to other taxes. However, various taxes inherently impose varying burdens. So long as all within the class subject to the particular tax are treated equally, there can be no complaint."

55 Ala. App. at 607-08, 318 So. 2d at 304 (citation omitted).

More recently, in *City of Prattville v. Welch,* 681 So. 2d 1050 (Ala. 1996), this Court addressed an equal-protection challenge asserted by a private liquor licensee to a municipal tax applicable to private liquor retailers but not to state owned stores. In upholding Prattville's municipal ordinance, this Court, quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359-60 (1973), stated:

> "'The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 666, 86 S. Ct. 1079, 1081, 16 L. Ed. 2d 169 [(1966)]. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' As stated in *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526 27, 79 S. Ct. 437, 440-441, 3 L. Ed. 2d 480 [(1959)]:
>
> > '"'The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that

> are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value."' "

681 So. 2d at 1052-53. In reversing the trial court's ruling that the Prattville municipal ordinance was unconstitutional, this Court stated: "[T]he trial court failed to take into consideration long-standing United States Supreme Court jurisprudence establishing a deferential rationality standard for reviewing state economic (tax) legislation under the Fourteenth Amendment. Under this standard, great deference is given to a state's classification of individuals or entities for tax purposes." *Id.* at 1052.

Finally, we note that in the seminal case of *Estes v. City of Gadsden,* 266 Ala. 166, 94 So. 2d 744 (1957), this Court upheld against an equal-protection challenge a substantially similar occupational tax levied by the City of Gadsden. The *Estes* Court stated:

> "It is seriously argued that the instant tax is in classification unreasonable, capricious and discriminatory. In the case of *Frazier v. State Tax Commission,* 234 Ala. 353, 175 So. 402, 406, 110 A.L.R. 1479 [(1937)], this court said:
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> "'As stated for this court in Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 [(1937)], the only limitation imposed upon the Legislature is that when it proceeds to impose a tax on occupations or privileges, it must be equal and uniform. The equality and uniformity [consist] in the imposition of the like tax upon all who engage in the vocation, or who may exercise the privilege taxed. . . .'

"It has been oftentimes stated that classification under the constitution is necessarily elastic, except that it should be made according to reasonable, just and practicable rules. If the selection is neither capricious nor arbitrary and rests upon some reasonable consideration of difference or policy as between the various groups and individuals taxed in the city, the courts have held that the classification is proper and that there is no denial of the equal protection of the law. Equal protection is satisfied when all persons of the same class fairly made are subject to the same amount and terms of such tax laws.

"'. . . .

"'. . .'A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"

Estes, 266 Ala. 166, 173, 94 So. 2d at 750-51 (citations omitted).

Applying these constitutional principles, the *Estes* Court upheld the municipal ordinance, finding sufficient distinctions between self-employed persons working in a profession and persons working as salaried, wage-earning employees in that same profession to justify a separate

classification for purposes of the occupational-tax scheme. *Id.* at 173-74, 94 So. 2d at 751. Thus, the *Estes* Court rejected the taxpayers' claims that the ordinance violated the Equal Protection Clause because of arbitrary and unreasonable classifications.

The *Estes* Court also rejected the taxpayers' claims of discrimination based upon an alleged additional tax burden placed upon independent contractors and certain other business forms as a result of the prior adopted general-license schedule of the city. The *Estes* Court noted:

> "Doubtless there may be inequalities but our courts are committed to the proposition, as stated by the Supreme Court of the United States in *Lawrence v. State Tax Commission,* 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102 [(1932)], as follows:
>
> > "'The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions.'"

Estes, 266 Ala. at 174, 94 So. 2d at 751.

Additionally, the Estes Court rejected the taxpayers' claim that the amount of the tax levied (1%) was so burdensome as to be unconstitutional, recognizing that "the extent of the burden is a matter for the discretion of the lawmakers, unless the act is so arbitrary as not to be an exercise of the taxing power at all, the form of the tax being a cloak for something else." *Id.*, citing *Bessemer Theatres v. City of Bessemer,* 261 Ala. 632, 75 So. 2d 651 (1954).

Further, notwithstanding the fact that persons employed as domestic workers in private homes and ministers of recognized religious bodies were exempted, the *Estes* Court found, between those occupations and other occupations, substantial differences that justified those exemptions. *Estes,* supra, at 173, 94 So. 2d at 750. See also *McPheeter v. City of Auburn,* 288 Ala. 286, 259 So. 2d 833 (1972) (relying upon *Estes* to uphold Auburn's ordinance imposing an occupational tax, which also exempted domestic workers and ministers). Because the *Estes* Court found that the classifications created by the Gadsden ordinance rested upon some reasonable consideration of difference or policy and because all persons of the same class were subject to the same tax, the requirement of equal protection was satisfied.

After carefully reviewing the record and the briefs, as well as studiously considering the oral arguments presented to this Court, we conclude that the exemptions mandated in Act 406 and allowed in Ordinance No. 1120 do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As the *Estes* Court held regarding the classifications at issue in that case, we conclude that the exempt classifications created by Act 406 and by Ordinance No. 1120 rest upon a reasonable consideration of difference or policy between the various groups and individuals. We also hold that the classifications created by Act 406 and Ordinance No. 1120 bear a fair relationship to a legitimate public purpose. For these reasons, the requirement of equal protection is satisfied.

First, we find the exemptions provided in Ordinance No. 1120 for persons engaged in professions and occupations, who are required to pay state license fees and who are expressly protected by state law from further imposition of license taxes, to be fairly and reasonably related to a legitimate governmental purpose. Although we do

not profess to understand the Legislature's reasons for creating the scheme of state-licensing requirements now in existence, we are not required to understand and accept its panoply of reasons for the taxation schemes it is authorized to enact. See *State ex rel. Attorney General v. Spann,* supra. We simply conclude that, as Jefferson County argued, the prohibition found in Act 406 against further taxation of persons engaged in professions and occupations subject to the state-licensing requirements furthers several possible legitimate governmental purposes. These governmental purposes may be those of economic development, statewide uniformity, or the protection of a future source of tax revenue. Any one of these purposes, or all of them, could serve as the rational and legitimate basis of the exempt classifications created by Act 406 (and adopted by legislative mandate in Ordinance No. 1120), which prohibits further taxation of persons engaged in the specified professions and occupations. Because we conclude that a fair and rational basis supports the challenged classification, we conclude that the *Richards* class has not met its burden of negating any conceivable set of facts that would support this challenged classification. See *Thorn v. Jefferson County,* 375 So. 2d 780, 787 (Ala. 1979) (plaintiff's burden of proof in challenging the constitutionality of an ordinance is to negate "every conceivable or reasonable basis which might support the [challenged] classification").

The second and third class of individuals considered exempt under Ordinance No. 1120 are those who do business as sole proprietors and who pay taxes to the County under its general business-license code and those individuals who do business as sole proprietors and pay taxes under the state license code, which in most instances includes a piggyback tax to the County. The *Richards* class contends that these classifications allow those individuals doing business as sole proprietors an

arbitrary and unreasonable exemption from the occupational tax, while their otherwise identical counterparts pay the occupational tax.

We reject this argument. This Court wrote in *Estes:*

> "[S]ome plumbers or architects or accountants are self employed and offer their services to the general public. Others do not do this but hire out to a specific employer. Does the fact that there may be some plumbers, architects, accountants, who fall in the first group of self employed persons, and some architects, accountants or plumbers who fall in the second group, mean there is no substantial distinction which makes the one class different from the other? The fact that the employee group is salaried or wage-earning, whereas the other group is not, would provide the substantial distinction which makes the one class different from the others and brings within the influence all who are under those same salary or wage earning conditions and applies equally to all in the class at the rate of one percent. Furthermore, we see no reason why, for example, plumbers, architects, or accountants must each be put in a separate class, because of a difference in the nature of their respective work. Each can, of course, be put into a separate classification and if so, why can they not be put in the same class if they are all paid by an employer and draw their pay in the City of Gadsden?"

Estes, 266 Ala. at 173-74, 94 So. 2d at 751 (citations omitted). We agree with the rationale stated in *Estes* and conclude that the separate classification of individuals who do business as sole proprietors and buy business licenses pursuant to the County's general licensing code or the State License Code is fairly related to a legitimate governmental purpose. Exempting a self-employed

individual from payment of an occupational tax, a tax being levied on the privilege of earning money in the role of an employee, certainly cannot be deemed irrational. Additionally, avoiding double taxation on a self-employed individual, who is required to pay the business-license tax as well as the expenses associated with running a business, furthers a potential governmental purpose of encouraging the survival of small business. We conclude that the exemption recognized for individuals who do business as sole proprietors and who pay a business-license tax pursuant to the County's general licensing code or pursuant to the state licensing code does not violate the Equal Protection Clause. *Estes,* supra.

The *Richards* class also challenges the exempt classifications allowed by Ordinance No. 1120 for persons employed as domestic workers in private homes and persons employed as ordained ministers. We need not engage in an extensive analysis of the constitutionality of these classifications, because this Court expressly recognized them to be valid in *Estes,* supra, and again in *McPheeter v. City of Auburn,* 288 Ala. 286, 292, 259 So. 2d 833, 837 (1972) ("In *Estes,* the exemption of domestic servants in private homes, and ordained ministers was specifically held constitutional since those two groups constituted reasonable classes which possess characteristics that distinguish them from the other taxed classes."). We again hold that the exempt classifications granted to domestic workers and ordained ministers under Ordinance No. 1120 do not violate the Equal Protection Clause.

Because we find a fair and rational basis underlying the five exempt taxpayer classifications mandated by Act 406 and authorized by Ordinance No. 1120, as interpreted by Jefferson County, we pretermit any further discussion or analysis of any remaining contentions raised by the *Richards* plaintiffs. See *New York Rapid Transit Corp.,* 303 U.S. at 578 (recognizing that, if any state of

facts reasonably can be conceived that would sustain the challenged classification, the judiciary's inquiry into the constitutionality of the legislative act is complete). We note that we have conducted our analysis of the constitutional issue presented in Case No. 1981680 in accordance with the presumption that an ordinance is presumed reasonable and valid, and that the burden is on the one challenging the ordinance to clearly show its invalidity. See *Thorn v. Jefferson County,* 375 So. 2d 780, 787 (Ala. 1979) (discussing presumption of validity of challenged classification and plaintiff's burden of proof to negate "every conceivable or reasonable basis which might support the classification"). Moreover, our review has been constrained by the long-standing principles of statutory construction and interpretation holding that the "wisdom, propriety or expediency of the ordinance is not a matter of review by this court. That is the province of the law-making body of the [County]. The court's duty is to consider the constitutionality and the validity of the ordinance under the constitution and laws of the State of Alabama." *Estes,* 266 Ala. at 170, 94 So. 2d at 747. In Case No. 1981680, we reverse Judge Rochester's order of June 17, 1999, and render a judgment in favor of Jefferson County. We also remand Case No. 1981680 with instructions for the trial court to enter an order directing and implementing a refund to the *Triantos* class members of all moneys collected pursuant to Judge Rochester's order of June 17, 1999.

CASE NO. 1990836

Jefferson County appeals from Judge Woodall's order of January 12, 2000, entered in *Triantos v. Jefferson County et al.,* restraining Jefferson County from continuing to collect the occupational tax from the exempt taxpayers, the members of the *Triantos* class. Judge Woodall's order

of January 12, 2000, declared that the members of the *Triantos* class were specifically excluded from the operation of Act 406 and Ordinance No. 1120; that the members of the *Triantos* class were thereby exempted from tax liability under the Act and the Ordinance; and that Jefferson County had no authority to levy the occupational tax upon the members of the *Triantos* class or to collect it from them. We affirm Judge Woodall's order.

Counties, being political subdivisions of the state, have no inherent power of taxation but have only such taxing power as the Legislature delegates to them. "'[U]pon them, in the absence of special constitutional restriction, the general assembly may confer the taxing power in such measure as it deems expedient, — "in other words, with such limitations as it sees fit as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons and property) which shall be subjected to taxation."'" *Frazier v. State Tax Comm'n*, 234 Ala. 353, 355, 175 So. 402, 403 (1937) (quoting earlier authorities). Although *Frazier* addressed a municipality's power to tax, the principles stated in *Frazier* are equally applicable to a county.

Jefferson County's authority to impose the occupational tax exists, and is limited, by virtue of its enabling legislation — Act 406. That Act specifically prohibits any county to which the Act applies from further taxing those persons subject to the state licensing sections referenced therein. The persons referenced in Act 406 are the very members of the *Triantos* class.

We agree with Judge Woodall, that Jefferson County has no authority to levy the occupational license tax upon the members of the *Triantos* class or to collect it from them. We affirm Judge Woodall's order of January 12, 2000, in which he restrained Jefferson County from continuing to collect the occupational tax from the members of the *Triantos* class. We further conclude that

the stay of Judge Woodall's order, issued by this Court on March 22, 2000, should be lifted. However, the effect of our ruling in Case No. 1981680 will moot the necessity of further action by the trial court in Case No. 1990836.

CASE NO. 1990961

Triantos appeals from Judge Woodall's failure to order a refund of the moneys collected from the exempt taxpayers by Jefferson County pursuant to Judge Rochester's June 17, 1999, order. His appeal is moot, however, in light of our remand order in Case No. 1981680.

CONCLUSION

Case No. 1981680. Having concluded that the exempt classifications mandated by Act No. 406 and authorized by Ordinance No. 1120, as interpreted and applied by Jefferson County, do not violate the Equal Protection Clause, we reverse Judge Rochester's injunctive order of June 17, 1999, entered in Case No. 1981680, in which he enjoined Jefferson County from further collecting the occupational tax from the members of the *Richards* class members unless it also collects the tax from the members of the *Triantos* class. The exempt classifications, as currently interpreted and applied, do not render the Ordinance unconstitutional on equal-protection grounds and, therefore, it is not for the courts of this State to direct or limit Jefferson County in its implementation of that Ordinance. We reverse Judge Rochester's order of June 17, 1999, and render a judgment in favor of Jefferson County on the complaint. We also remand Case No. 1981680 with instructions for the trial court to enter an order directing a refund from the escrow account of all moneys collected from the *Triantos* class members pursuant to Judge Rochester's order of June 17, 1999, order.

Case No. 1990836. For these same reasons, we affirm Judge Woodall's injunctive order of January 12, 2000, entered in Case No. 1990836, in which Judge Woodall enjoined Jefferson County from levying and/or collecting the occupational tax from the *Triantos* class pursuant to Ordinance No. 1120 or Act 406. We conclude that the stay granted by this Court and dated March 22, 2000, of Judge Woodall's injunctive order should be lifted, although our remand in Case No. 1981680 will make unnecessary further action by the trial court in Case No. 1990836.

Case No. 1990923. As discussed above, the appeal by the *Richards* plaintiffs from the denial of their motion to intervene in the *Triantos* action is rendered moot by the procedural posture of these appeals.

Case No. 1990961. In light of our ruling in Case No. 1981680, the issue raised in this appeal by the *Triantos* class, whether Judge Woodall erred in deferring any ruling on their request for a refund from the escrow account of all moneys collected by Jefferson County as occupational taxes from the *Triantos* class pursuant to Act 406 and Ordinance No. 1120, is rendered moot.

1981680 — REVERSED AND JUDGMENT RENDERED AND CASE REMANDED WITH INSTRUCTIONS.

1990836 — AFFIRMED; STAY LIFTED.

1990923 — APPEAL DISMISSED.

1990961 — APPEAL DISMISSED.

Houston, Lyons, Brown, Harwood, and Stuart, JJ., concur.

Moore, C.J., concurs in part and dissents in part.

Johnstone, J., concurs in part, concurs in the result in part, and dissents in part.

Woodall and See, JJ., recuse themselves.

MOORE, Chief Justice (concurring in part and dissenting in part).

In 1987, acting pursuant to Act No. 67-406, Ala. Acts 1967, the Jefferson County Commission adopted Ordinance 1120. Ordinance 1120 imposed a "license fee" of 1½ of 1% (0.5%) on the earnings received from "any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama by any clerk, laborer, tradesman, manager, official, or other employee." Ordinance 1120 exempted three classes of individuals from its purview: domestic workers in private homes, individuals doing business as "sole proprietorships" who paid fees under the State license code, and individuals doing business as "sole proprietorships" who paid fees to Jefferson County under the County's general business-license code. As a result, the ordinance created an unusually diverse class of exempt citizens, including lawyers, doctors, magicians, astrologers, and operators of hot-dog stands. Some citizens have not been required to pay any fee, either under the ordinance or under the licensing code. Numerous others, including nurses and real-estate appraisers, have been required to pay both this "fee" under the ordinance and a separate license fee. The tax burden that Ordinance 1120 imposed was also unusually diverse. While the license code requires some of the exempt individuals to pay a fixed and nominal sum, the ordinance requires other citizens to pay a percentage of their income.

Jefferson County argued to the United States Supreme Court that the levy made by Ordinance 1120 was an income tax, not a license fee. See *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 439 (1999). Jefferson County then argued to this Court that this levy was a license fee, not an income tax. See *Parker v. Jefferson County*, [Ms. 1991004, April 20, 2001] ___ So. 2d ___ (Ala. 2001).

The *Richards* class challenged Ordinance 1120, asserting that Ordinance 1120 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The trial court agreed, holding that the exemptions embodied in Ordinance 1120, and the exemptions established by the manner in which Jefferson County has enforced Ordinance 1120, violate the Equal Protection Clause. I agree. Even if this Court ignores the hypocrisy of Jefferson County's mutually exclusive arguments to the United States Supreme Court and to this Court, and even if this Court is not bothered by what I consider to be a troubling precedent — that a levy based on a percentage of income is a fee and not an income tax — I conclude that the trial court correctly held that Jefferson County had violated the Equal Protection Clause in its application of Ordinance 1120.

Today's main opinion states:

> "The overarching issue presented in this group of appeals is whether the Equal Protection Clause of the Fourteenth Amendment mandates that all professions and occupations be treated the same by the State of Alabama and by Jefferson County for occupational-tax purposes."

___ So. 2d at ___. This attempted statement of the issue is the fundamental error the majority makes in its analysis and in its judgment reversing the judgment in case No. 1981680. In *Eagerton v. Gulas Wrestling Enterprises, Inc.*, 406 So. 2d 366, at 370 (Ala. 1981), this Court established the fundamental issue in an equal-protection challenge to a license fee or a tax:

> "The basic tenet of the equal protection clause is not that all persons must be treated equally, but rather that all persons similarly situated must be treated equally."

See *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."). In *Eagerton,* supra, as in the instant case, the plaintiffs contested a levy by Jefferson County on equal-protection grounds. Both the *Richards* plaintiffs and Jefferson County cited *Eagerton* as controlling precedent.

The main opinion quotes *Jolly v. City of Birmingham,* 55 Ala. App. 603, 608, 318 So. 2d 300, 304 (1975), for this proposition: "[I]nconsistent enforcement of an ordinance constitutes no argument against the power to pass it." In *Allegheny Pittsburgh Coal Co. v. County Commission,* 488 U.S. 336 (1988), however, a unanimous United States Supreme Court held that inconsistent enforcement of an otherwise constitutional statute was arbitrary and capricious and thus a violation of the Equal Protection Clause.

Jefferson County deviated from the precedent in *Eagerton* supra, and *F.S. Royster Guano Co.,* supra, by exempting "preachers," then indulging in an enforcement scheme that arbitrarily and capriciously applied that exemption to preachers who were ordained, but not to preachers who were "unordained."

> "The only limitation imposed upon the Legislature is that when it proceeds to impose a tax on occupations or privileges, it must be equal and uniform. The equality and uniformity consist in the imposition of the like tax upon all who engage in the vocation, or who may exercise the privilege taxed."

Nachman v. State Tax Comm'n, 233 Ala. 628, 635, 173 So. 25, 31 (1937) (citations omitted).

Jefferson County's enforcement scheme for Ordinance 1120, by enforcing the ordinance against "unordained" ministers but exempting "ordained" ministers, violated the precedent this Court set in *Eagerton*, supra, and *Nachman*, supra, and the precedent the United States Supreme Court set in *F.S. Royster Guano Co.*, supra.

I concur in the main opinion as it relates to Case No. 1990836, Case No. 1990923, and Case No. 1990961. The effort to repair the equal-protection defect noted above by taxing all of the individuals who were previously exempt was a separate error, as the trial judge held. This Court wrote in *Siegelman v. Chase Manhattan Bank (USA), N.A.*, 575 So 2d 1041, 1046 (Ala. 1991):

> "Neither is it the role of the courts to 'usurp the role of the legislature and correct defective legislation or amend statutes under the guise of [judicial] construction.'"

(Citations omitted.) The Court properly holds that the appeals in Case No. 1990923 and Case No. 1990961 have been rendered moot by the resolution of the first two cases.

I would affirm the judgment of the trial court in the *Richards* litigation, because that court's ruling was constitutionally correct; it was correct because Jefferson County's enforcement of Ordinance 1120 was constitutionally improper. I therefore respectfully dissent as to Case No. 1981680. I concur as to Case No. 1990836, Case No. 1990923, and Case No. 1990961.

JOHNSTONE, Justice (concurring in part, concurring in the result in part, and dissenting in part).

I respectfully dissent from the holding that Ordinance 1120 is constitutional. This ordinance arbitrarily and capriciously exempts a hodgepodge of categories of taxpayers while it does not exempt other virtually indistinguishable categories of taxpayers. These exemptions are not supported or dignified by Act No. 406, Ala. Acts 1967, which requires only a well-defined and logically limited subset of the exemptions. Therefore, I respectfully dissent from the judgment in case number 1981680, *Jefferson County v. Richards,* reversing that aspect of the order by the trial court declaring that the ordinance, judged together with all of its exemptions, is unconstitutional.

I agree, however, that the trial court lacked authority to remedy the unconstitutionality of Ordinance 1120 by requiring Jefferson County to collect the tax even from the exempted taxpayers. Therefore, I concur in the judgment of this Court reversing and rendering that aspect of the order of the trial court in case number 1981680, *Jefferson County v. Richards,* authorizing Jefferson County to collect the tax from the exempted taxpayers in order to save the constitutionality of the ordinance. I further concur in the judgment of this Court remanding case number 1981680, *Jefferson County v. Richards,* "with instructions for the trial court to enter an order directing a refund to the *Triantos* class members of all monies collected pursuant to Judge Rochester's order of June 17, 1999."

I further concur in the judgment of this Court in case number 1990836, *Jefferson County v. Triantos,* affirming Judge Woodall's January 12, 2000 injunction enjoining Jefferson County from levying or collecting the occupational tax from the *Triantos* class. I further concur that we should lift our stay of Judge Woodall's injunction.

I concur in the result in case number 1990923, *Richards v. Triantos.* I would affirm the denial of the *Richards* plaintiffs' motion to intervene in the *Triantos* action. The majority achieves the same result by declaring this appeal moot and dismissing it.

Finally, in case number 1990961, T*riantos v. Jefferson County,* I concur that this appeal is moot. The *Triantos* appellants are getting the relief they seek from our judgment in case number 1981680, *Jefferson County v. Richards,* instructing the trial court to direct Jefferson County to refund the monies collected from the *Triantos* class. Therefore, I concur in the dismissal of the appeal in case number 1990961, *Triantos v. Jefferson County.*

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS, et al.,

PLAINTIFFS,

VS. CASE NO. CV-92-3191

JEFFERSON COUNTY, et al.,

DEFENDANTS.

JUDGMENT

The Court has considered the evidence, argument and pleadings in this matter, along with the applicable statutes, ordinance and caselaw. After a consideration of same, the Court finds that Section 4 of Alabama Act 406 (1967), and Section 1 (B) of Jefferson County Ordinance 1120 (1987), are unconstitutionally violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:

1) Fairness is the notion underlying the concept of equal protection, and, as such, fairness must be examined when considering how a government treats its citizens. The unfair application of the County's occupational tax violates the rights of wage earners and certain select professionals by unfairly subjecting them to an employment tax while allowing other occupations to be exempt from the tax by paying a nominal yearly license fee.

2) The ordinance and statute in question each contain vague definitions which lead to subjective interpretations and inconsistent enforcement of the tax.

3) Many taxpayers pay a license fee and also pay an occupational tax, which is in direct conflict with Act 406.

4) The exemptions established by the statute and ordinance unjustly and unreasonably create a class of tax-

payers who must bear the sole burden of providing occupational tax dollars for the County.

5) The exemptions are arbitrary, unfair and irrational.

Accordingly, it is hereby Ordered as follows:

(a) Defendant's motion to dismiss for want of jurisdiction is denied.

(b) The Jefferson County Commission shall have until January 15, 1999, to seek the removal of the unconstitutional exemptions from Ordinance 1120 through proposed legislation or to remove the occupational tax altogether. A hearing is set for January 19, 1999, at 10:00 a.m., at the Jefferson County Courthouse to determine if there has been compliance with the Court's order. The Court will also determine any proper injunctive relief required for compliance.

(c) A hearing is set for June 16, 1999, at 10:00 a.m. at the Jefferson County Courthouse for the Court to determine if the Alabama legislature has remedied Act 406, and if there has been corresponding action by the Jefferson County Commission with regard to Jefferson County Ordinance 1120.

(d) At the compliance hearing of June 16, 1999, the Court shall determine what amount, if any, should be refunded the class and subclass members. The Court shall also consider the issue of plaintiffs attorney's fees. The Court may also determine further injunctive relief.

(e) After January 19, 1999, there will be a separate order entered by this Court regarding the class and subclass members.

(f) The Court retains jurisdiction of this matter.

Done and Ordered this 12th day of November, 1998.

/s/ John E. Rochester

JOHN E. ROCHESTER
CIRCUIT JUDGE SPECIALLY SITTING

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV-92-03191
PLAINTIFFS,	*	
VS.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
DEFENDANTS.	*	

ORDER

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates the Buck Act (4 U.S.C. §111) as it pertains to federal employees.

3. The trial court in *Beddingfield v. Jefferson County,* 527 So. 2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the Constitution of Alabama of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987).

Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary Judgment is DENIED as to Counts One and Two.

Done and Ordered this 8th day of April, 1993.

/s/ John E. Rochester

JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees, excluding employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;	*	CIVIL ACTION NO. CV9203191
Plaintiffs,	*	
vs.	*	
JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama	*	
Defendants.	*	

COMPLAINT

Plaintiffs, by and through their undersigned counsel, complain and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Rule 57, Alabama Rules of Civil Procedure and 42 U.S.C. 1983, as this is a civil action arising under the laws and Constitution of the United States. This action involves a violation of federal law for which 42 U.S.C. 1983 provides a remedy, and to which Rule 37 of the Alabama Rules of Civil Procedure is applicable. A question of intergovernmental immunity arising under the Buck Act, 4 U.S.C. 101, et seq, is presented by Plaintiffs Dykes individually, and on behalf of all similarly situated federal employees. Venue lies in the Circuit Court of Jefferson County, Alabama, the tax challenged by this action being levied and collected by Jefferson County, Alabama, against and from plaintiffs, and similarly situated class members within Jefferson County, Alabama.

PARTIES

2. Plaintiff Jason Richards is a courier privately employed by a law firm in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Fannie Hill is a domestic servant privately employed in commercial buildings in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their behalf, and in a representative capacity on behalf of all other employees in Jefferson County, Alabama, other than employees of the United States of America, who have been subject to the levy, collection and payment of taxes established by Jefferson County Ordinance 1120, commonly known as the Jefferson County Occupational Privilege Tax ("the occupa-

tional tax") since January 1, 1988. George David Dykes is a Reclamation Specialist employed by the United States of America in the Office of Surface Mining, Department of the Interior in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Joan Foley Dykes is a Registered Nurse employed by the United States of America in the Department of Veterans' Affairs in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees of the United States of America, who have been subject to the levy, collection and payment of the occupational tax since January 1, 1988. Plaintiffs Jason Richards, Fannie Hill, and Joan Foley Dykes have been required by their employers to pay the occupational tax at all times relevant to these proceedings, continuously since January 1, 1988, when the occupational tax became effective. Plaintiff George David Dykes was required by his employer to pay the occupational tax for approximately one year after enactment of the occupational tax, after which he refused to continue to do so, based upon the authorities cited herein.

CLASS ACTION AVERMENTS

3. This lawsuit is brought by plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(a) and Rule 23(b)(1) of the Alabama Rules of Civil Procedure for injunctive and declaratory relief, and for an order awarding members of the plaintiff classes compensatory damages in sums equal to the amounts of taxes illegally levied, collected and paid by them, and for relief incident and subordinate thereto, including costs and attorneys fees pursuant to 42 U.S.C. 1988, and such other authorities as shall be determined applicable to this action.

4. The classes represented by plaintiffs in this action, and of which plaintiffs themselves are members, consist of all persons subject to the occupational tax, both federal and non-federal employees, who have been subject to its levy, collection and payment since January 1, 1988, when the occupational tax became effective.

5. The exact number of members of the classes, as herein identified, is not known, but it is estimated that there are thousands of members of each class. The classes are so numerous that joinder of individual members herein is impracticable.

6. There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

7. The claims of plaintiffs, who are representatives of the class herein are typical of the claims of the classes they represent, in that the claims of all members of the classes, including plaintiffs, depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each. There is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein. The Dykes Class of federal employees are beneficiaries of federal and state statutes which prohibit discrimination in a manner which is consistent with the general prohibition of discrimination applicable to the Richards/Hill Class of non-federal employees, and both classes are protected equally by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the state laws cited herein.

8. The named plaintiffs are the representative parties for their respective classes, and are able to, and will, fairly and adequately protect the interests of the classes they

represent. The attorneys for plaintiffs are experienced and capable in litigation in the field of constitutional, tax and civil rights claims, and have successfully represented claimants in other litigation of this nature.

ALLEGATIONS OF FACT

9. On or about January 1, 1988, Defendant Jefferson County levied and began collecting, and Plaintiffs and the classes they represent began involuntarily paying, the occupational tax, which was described by Defendant as a "license or privilege tax on natural persons engaged in any vocation, occupation, calling or profession who are not required by law to pay any license or privilege tax to the state or county." A copy of the occupational tax ordinance is attached to this complaint, and made a part hereof as Exhibit A.

10. The occupational tax is calculated as one-half of one percent of the gross earnings of plaintiffs and members of both classes, but is characterized by Defendant as a license or privilege tax, rather than an income tax. Specifically the taxing ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

11. The taxing ordinance also defines gross receipts and compensation, as follows:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words

> shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and compensation shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for the by employee to the employer.

12. The occupational tax carves out of its scope, by way of its definition of "vocation, occupation, calling and profession" a substantial array of persons, as follows:

> The words "vocation, occupation, calling and profession" shall mean the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those, services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corpora-

> tion, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; Sections 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

and also includes within its ambit all federal employees represented here by Plaintiffs Dykes, as follows:

> The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

13. The occupational tax broadly defines "employer" to "mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance." (This subsection is set forth in full at paragraph 12 of this complaint). Defendant, by and through its Director of Revenue and County Attorney, has interpreted "employer" to include the United States of America, and "employee" to include all federal employees in Jefferson County, including all United States District Judges in the Northern District.

14. The occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended,

which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants employed in private homes. By its terms and in actual practice, it taxes all federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes.

15. The net effect, dollarwise, of the occupational tax, is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would be levied at more than ten times the amount of the license fee paid by these high income professionals. In all cases, the occupational tax imposes upon those citizens against whom it is levied and collected a percentage of income tax which is substantially more than the license fees paid by similarly situated persons exempted from its burden.

16. The occupational tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and, insofar as federal employees are concerned, 4 U.S.C. 111. The array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which falls within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of

Fourteenth Amendment to the Constitution of the United States.

17. The content, nature and characteristics of the employment of Plaintiffs Dykes, Richards and Hill, and all the members of the classes they represent, are neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics of the employment of the above described persons exempt from the occupational tax, and the economic burden thrust upon them by Defendant, relative to those exempted, is substantial and absurd.

18. The irrationality and unconstitutionality of the occupational tax is well known to the Defendant's officers and agents responsible for its administration and collection, and has resulted in their adoption of a policy of further exemption from its levy and collection federal employees who refuse to pay it. This pay-if-you-wish policy is itself arbitrary and capricious, irrational, indicative of Defendant's callous disregard of the constitutional rights of other federal and private employees from whom the tax is collected, and demonstrative of Defendant's cognizance of the constitutional defects complained of herein.

19. Plaintiffs aver that unless Defendant is enjoined and restrained by the court from enforcing the occupational tax ordinance, they will suffer economic injury.

COUNT ONE
DYKES CLASS BUCK ACT CLAIMS AND FEDERAL CONSTITUTIONAL CLAIMS

20. Plaintiffs Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim Defendants, a political subdivision of the State of Alabama and its Director of Revenue, acting by and through their County Attorney, and

such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically 4 U.S.C. 111 and the due process and equal protection clauses of the Constitution of the United States.

21. The occupational tax violates the equal protection guaranties of the Fourteenth Amendment to the United States Constitution and 4 U.S.C. 111 by unreasonably and arbitrarily favoring the above described state, local and private employees who are exempted from its purview in the unequal manner described above while taxing the similarly situated federal employees represented by Plain tiffs Dykes as described herein.

22. The occupational tax has been previously challenged in this court on non-federal and other state law grounds, and, its measurement by a percentage of pay or compensation for personal service as described by 4 U.S.C. 111 notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal.

23. Plaintiffs Dykes and their similarly situated federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT TWO
RICHARDS/HILL CLASS FEDERAL CLAIMS

24. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees they represent, claim Defendants, a political subdivision of the State of Alabama, and its Revenue Commissioner, acting in concert with their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting or causing its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

25. The occupational tax violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by discriminating against Plaintiffs Richards and Hill, and the class of similarly situated non-federal employees they represent, a class against whom it has been and is now levied and collected, in a manner which is not only arbitrary and irrational, as described herein, but which also creates an unjust, unreasonable and improper classification of citizens subject to the tax. There is no legitimate difference between Plaintiffs Richards and Hill, and the class of non-federal employees they represent and the above described exempted employees which is related to any legitimate government object or purpose, and the arbitrariness and capriciousness of selection of the Richards/Hill class by Defendant to pay the occupational tax is clear upon the face of the taxing ordinance and in its implementation by Defendant. Persons engaged in the same businesses as Richards and Hill, and the members of the class they represent are granted exemption privileges by Defendant under em-

ployment conditions which are the same as those experienced by Richards, Hill and the Richards/Hill class, while the Richards/Hill class is contemporaneously, arbitrarily and unreasonably — in the context of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States — taxed.

26. The occupational tax has been previously challenged in the state courts on other state law grounds, and, measurement by a percentage of pay or compensation for personal service notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal. Additionally, these federal constitutional claims are joined in this action with federal Buck Act claims which present a related federal statutory question under federal law.

27. Plaintiffs Richards and Hill and their similarly situated non-federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT THREE
DYKES CLASS PENDENT STATE LAW CLAIMS

28. Plaintiff Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim the occupational tax violates Code of Ala. 1975, Section 40-18-3, which provides that the salaries, fees, commissions or other income of officers or agents of the United States or its agencies and

instrumentalities or its contractees, received from the United States or from its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, but without discrimination, and only to the same extent and in the same manner as other income is taxed, insofar as the State of Alabama may be constitutionally or legally authorized to tax such income.

29. The Alabama Constitution prohibits cities and counties from collecting income taxes, hence Defendant's designation of the occupational tax as a license or privilege tax, despite its measurement by a percentage of gross income or gross receipts.

30. The occupational tax, as a license tax measured by a percentage of gross income or gross receipts, authorized by a general law of the State of Alabama, is nevertheless subject to the "without discrimination" prohibition of Code of Ala. 1975, Section 40-18-3, and that code section's requirement that it be collected "only to the same extent and in the same manner as other income is taxed." Plaintiffs Dykes and the class of federal employees they represent, based upon the above described allegations regarding persons exempted from paying the occupational tax, aver that they have been discriminated against and required to pay taxes to a different extent and in a different manner from their incomes in violation of Code of Ala. 40-18-3 and the due process and equal protection provisions of the Constitution of Alabama of 1901.

COUNT FOUR
RICHARDS/HILL CLASS PENDENT STATE CLAIMS

31. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees subject to the occupational tax which they represent, aver that the

occupational tax discriminates against non-federal employees, as described above, in a manner which violates the due process and equal protection provisions of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant and award them the following relief:

A. That a hearing be set as soon as practicable after commencement of this action, under Rule 23(c)(1), Federal Rules of Civil Procedure, to determine by order whether this action is to be maintained as a class action, and whether certification should be conditional, and whether the Richards' and Dykes' classes should be certified as sub-classes pursuant to Rule 23(c)(4)(B), Alabama Rules of Civil Procedure.

B. That the Court declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3.

C. That the Court declare the occupational tax unconstitutional in its application to plaintiffs, depriving them of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3 by virtue of Defendants' policy of allowing taxpayers who disagree with the tax to disregard it while insisting upon its payment by those who cannot persuade their

employers to cease payroll deductions or who otherwise lack the necessary clout with Defendants to prevent its levy and collection.

D. That the Court award plaintiffs, as compensatory damages suffered as a result of Defendant's deprivations of the constitutional rights described herein, a sum equal to the amount of tax each has paid to the Defendant since January 1, 1988.

E. That the Court enjoin and restrain Defendant from continued deprivations of the constitutional rights described herein by way of the occupational tax.

F. That the Court allow plaintiffs and their counsel all costs in this proceeding and payment of a reasonable attorneys fee, determined by 42 U.S.C. 1988 and/or pursuant to equitable common fund principles to attorneys for plaintiffs and the classes represented by them.

G. That the Court award plaintiffs such other and further relief as the Court, after a full hearing, deems appropriate.

BAXLEY, DILLARD & DAUPHIN

/s/ William J. Baxley

WILLIAM J. BAXLEY

/s/ Joel E. Dillard

JOEL E. DILLARD
Attorneys for Plaintiffs
2000 Sixteenth Avenue South
Birmingham, Alabama 35205
(205) 939-0995

Plaintiffs' Addresses
c/o Baxley, Dillard & Dauphin
2000 16th Avenue South
Birmingham, AL 35205

Defendants' Addresses
Jefferson County
c/o Edwin A. Strickland
County Attorney
214 Jefferson County Courthouse
Birmingham, AL 35263

Randy Godeke, Director
Jefferson County Department of Revenue
100-A Courthouse
Birmingham, AL 35263

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY
TENTH JUDICIAL CIRCUIT, ALABAMA

JASON RICHARDS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. CV 92-3191
	)	
JEFFERSON COUNTY, et al.,	)	
	)	
Defendants.	)	

ANSWER

Come now the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually, and in his official capacity as Director of the Jefferson County, Alabama, Department of Revenue, and for answer to the Complaint state as follows:

FIRST DEFENSE

Admission and Denial

1. For answer to paragraph 1 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 42 U.S.C. § 1983, 4 U.S.C. § 101 and Rule 57, Alabama Rules of Civil Procedure. Defendants admit that Jefferson County, Alabama, is the proper venue for this case.

2. For answer to paragraph 2 of the Complaint, Defendants demand strict proof in that Defendants are without knowledge or information sufficient to from a belief as to the truth of the allegations regarding residence and employment of Jason Richards, Fannie Hill, George David

Dykes and Joan Foley Dykes. Defendants state that they are without sufficient information to form a belief as to the truth of the remaining allegations of paragraph 2 of the Complaint and demand strict proof.

3. For answer to paragraph 3 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the provisions of Rule 23, Alabama Rules of Civil Procedure.

4. For answer to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are subject to the Jefferson County occupational tax.

5. For answer to paragraph 5 of the Complaint, Defendants admit that there are numerous taxpayers.

6. For answer to paragraph 6 of the Complaint, Defendants deny that the Jefferson County occupational tax is unconstitutional.

7. For answer to paragraph 7 of the Complaint, Defendants deny that the occupational tax is unconstitutional. Defendants state that they are without information and belief as to any conflicts which may or may not exist between Plaintiffs and demand strict proof.

8. For answer to paragraph 8 of the Complaint, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and demand strict proof.

9. For answer to paragraph 9 of the Complaint, Defendants admit that on or about January 1, 1988, Jefferson County, Alabama, began to levy and collect the occupational tax. Defendants deny that Plaintiffs paid said tax involuntarily. For answer to the remaining portion of paragraph 9 of the Complaint, Defendants plead the language of the occupational tax ordinance which is attached hereto as Exhibit "A" and Act No. 406, Legislature 1967, attached as Exhibit "B."

10. For answer to paragraph 10 of the Complaint, Defendants plead the plain language of the Jefferson

County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

11. For answer to paragraph 11 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

12. For answer to paragraph 12 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

13. Admitted.

14. For answer to paragraph 14 and 15, Defendant states as follows:

The Jefferson County Occupational Tax Ordinance No. 1120 comports with the express authority granted to the Jefferson County Commission by Act No. 406, Legislature of Alabama, 1967 ("Act No. 406"). Act No. 406 reflects an acknowledgment of the Alabama Legislature that numerous person, corporations, firms, associations or entities were already required by State law to pay a license or privilege tax to either the State of Alabama or to the County pursuant to Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940, as amended. Act No. 406 authorized the County Commission to levy a license or privilege tax upon any person, corporation, firm, association or other entity and business, vocation, occupation, calling or profession that is not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing provisions of the Code of Alabama.

The legislature in Section 6, Act No. 406, further limited the authority granted to the County Commission by declaring that:

> Section 6. No license or privilege tax levied by the governing body of the county on any person for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type business activity.

Accordingly, the Jefferson County Occupational Tax ordinance incorporates the same exclusions from its provisions as are required by Act No. 406. Further, the Jefferson County Occupational Tax Ordinance specifically excludes "domestic servants employed in private homes" for the reason that such persons are excluded from the occupational tax of the City of Birmingham which is the largest municipality located in Jefferson County, as required by Section 6, Act No. 406, above.

15. Defendants deny paragraphs 16 and 17. For further answer thereto, Defendants assert that federal employees engaged in a business, vocation, occupation, calling or profession are treated exactly the same as all other persons without regard to the nature of their employer. That is, only those federal employees that are not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing quoted provisions are subject to the occupational tax.

The purpose of Act No. 406 was to authorize the County to impose a license or privilege tax upon persons who are engaging in such businesses, vocations, occupations, callings and professions without paying any license tax through either the State or County.

Additionally, the rate of the Jefferson County Occupational Tax is exactly the same for all persons subject thereto. Said rate is .05 percent of the gross receipts of such persons earned in Jefferson County. There is no difference in rate between persons employed by the fed-

eral government and all other persons who are subject to the tax.

16. Defendants deny paragraph 18. For further answer Defendants assert that Defendants have instituted a reasonable and orderly procedure to effect collection of the occupational tax. Substantial start up work and effort has been required to develop the required information so as to identify those persons subject to the tax and to initiate tax withholding procedures by employers in the County. Substantial efforts were required to achieve such with holding action by the federal employers in Jefferson County. No exceptions from the tax beyond those required by Act No. 406 have been established or allowed. A program to collect arrearages from persons who have failed or refused to pay the tax as required by law is ongoing.

17. Defendants deny paragraph 19.

18. For answer to paragraph 20 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United State of America.

19. Denied.

20. For answer to paragraph 22 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. Defendants aver that the occupational tax at issue in this case has already been held constitutional by the Alabama Supreme Court in the case *Beddingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). Further, that the Plaintiffs in *Beddingfield* had the opportunity to appeal the *Beddingfield* decision of the Alabama Supreme Court to the Supreme Court of the United States, which opportunity said Plaintiffs failed to pursue and thereby waived and forfeited and which decision of the Alabama Supreme

Court is now a matter adjudged and conclusive upon and res judicata to all of the rights of Plaintiffs asserted herein. Defendants deny the remaining allegations of paragraph 22 of the Complaint.

21. Denied.

22. For answer to paragraph 24 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

23. Denied.

24. For answer to paragraph 26 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. The Alabama Supreme Court has held that the occupational tax at issue in this case is constitutional. *Beddingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988). Defendants deny the remaining allegations of paragraph 26 of the Complaint.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendants deny each and every remaining allegations of the Complaint and demand strict proof thereof.

SECOND DEFENSE

Res Judicata

Defendants plead the affirmative defense of res judicata as a complete or partial bar to the causes of action set forth in the Complaint.

THIRD DEFENSE

Collateral Estoppel

Defendants plead the affirmative defense of collateral estoppel to the causes of action set forth in the Complaint.

FOURTH DEFENSE

Non Claim Statute

Defendants plead the Alabama non claim statute as a complete or partial bar to the relief requested in the Complaint.

FIFTH DEFENSE

Laches

Defendants plead the defense of laches as a complete or partial bar to the causes of action set forth in the Complaint.

SIXTH DEFENSE

Statute of Limitations

Defendants plead the applicable statute of limitations as a complete or partial bar to the relief sought in the Complaint.

SEVENTH DEFENSE

No Deprivation of Federally Protected Right

Defendants aver that Plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

EIGHTH DEFENSE

Voluntary Payment

Defendants aver that all payments made by named Plaintiffs have been voluntary.

NINTH DEFENSE

No Buck Act Violation

Defendants plead the provisions of 4 U.S.C. § 106 as a defense to Plaintiffs' Buck Act claims.

TENTH DEFENSE

Immunity

Defendant, Godeke, pleads the defense of immunity whether absolute, qualified, good faith or discretionary function.

ELEVENTH DEFENSE

Waiver

Defendants plead the affirmative defense of waiver as a complete or partial bar to the causes of action set forth in the Complaint.

TWELFTH DEFENSE

General Defenses

1. Defendants assert that the Complaint fails to state a cause of action upon which relief can be granted.

2. Defendants plead good faith in all their dealings with Plaintiffs.

3. Defendants plead the general issue.

/s/ Edwin A. Strickland

EDWIN A. STRICKLAND
County Attorney
214 Jefferson County
Courthouse
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

/s/ Jeffrey M. Sewell

JEFFREY M. SEWELL
Assistant County Attorney
214 Jefferson County
Courthouse
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

/s/ Charles S. Wagner

CHARLES S. WAGNER
Assistant County Attorney
214 Jefferson County
Courthouse
716 North 21st Street
Birmingham, AL 35263
(205) 325-5688

CERTIFICATE OF SERVICE

I have served a copy of the foregoing ANSWER on counsel for all parties, by placing same in the U.S. Mail, postage prepaid and properly addressed, this the 29 day of May, 1992.

/s/ Jeffrey M. Sewell

JEFFREY M. SEWELL
Assistant County Attorney

cc: William J. Baxley
Joel E. Dillard
Baxley, Dillard & Dauphin
2000 - 16th Avenue South
Birmingham, AL 35205

Thomas L. Stewart
Gorham, Waldrep, Stewart, Kendrick,
Bryant, Battle & Alfano
2101 - 6th Avenue North
Suite 700
Birmingham, AL 35203

Act No. 406

AN ACT

To authorize the governing body of any county of the state having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

Be It Enacted by the Legislature of Alabama:

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to

either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

ORDINANCE NO. 1120

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the word as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes

and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other consideration having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or

other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half-percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the Oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Rev-

enue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each

person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any license or supposed license, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunities for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of

books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or under payment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay

such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall be come liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition

to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

Supreme Court, U.S.
FILED
OCT 1 2001
OFFICE OF THE CLERK

No. 01-370

In The

Supreme Court of the United States

JASON RICHARDS, ET AL.,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

JEFFERSON COUNTY'S BRIEF IN OPPOSITION

WILLIAM M. SLAUGHTER
Counsel of Record
J. VERNON PATRICK, JR.
HASKELL SLAUGHTER YOUNG & REDIKER, L.L.C.
1200 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203-2618
(205) 251-1000

Attorneys for Respondent Jefferson County, Alabama

EDWIN A. STRICKLAND
JEFFREY M. SEWELL
CHARLES S. WAGNER
Jefferson County Attorney's Office
Jefferson County Courthouse
716 Richard Arrington Boulevard
Room 280
Birmingham, Alabama 35203
(205) 325-5688

Attorneys for Respondent Jefferson County, Alabama

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether as the result of murky understanding or sensationalist exaggeration, the questions presented for review in the Petition (at pp. i-ii) are prolix and confusing. The respondent Jefferson County considers the following to be a fair and comprehensive statement of the questions presented for review:

I.

Do the exemptions from Jefferson County's Occupational Tax mandated by Section 4 of Act No. 406 enacted at the 1967 Regular Session of the Legislature of Alabama ("Act No. 67-406") or allowed by Section 1(B) of the County's Ordinance No. 1120 (1987) ("Ordinance No. 1120") deprive petitioners of equal protection, in violation of the Fourteenth Amendment to the United States Constitution?

II.

In reviewing the trial court's ruling on whether the exemptions from the County's occupational tax deny equal protection to petitioners (plaintiffs below), was the Alabama Supreme Court limited to the record at trial, bound by a county commissioner's "uncontradicted testimony," or bound by the trial court's findings of fact and conclusions of law?

QUESTIONS PRESENTED FOR REVIEW – Continued

III.

In reviewing the trial court's ruling on whether the exemptions from the County's occupational tax deny equal protection to petitioners (plaintiffs below), was the Alabama Supreme Court entitled to conduct an independent, *de novo* review of the "facts" and, consistent with the separation of powers between the judicial and legislative branches, recognize that the Alabama Legislature had no obligation to articulate its purpose or rationale for the exemptions and, further, recognize that, in enacting tax legislation, particularly with respect to occupational taxes, the Legislature has broad discretion to classify businesses, trades and professions and tax them at different rates or to exempt them altogether from taxation?

IV.

Does Jefferson County's enforcement of Ordinance No. 1120 deny equal protection to petitioners (plaintiffs below) in violation of the Fourteenth Amendment?

V.

Does Jefferson County's failure to date to sue a few ordained ministers who refuse to pay the occupational tax constitute a violation of the equal protection rights of "Muslim clerics" or "tent evangelists" that can be asserted in this case by petitioners (plaintiffs below) who are not "Muslim clerics" or "tent evangelists"?

QUESTIONS PRESENTED FOR REVIEW – Continued

VI.

Does the Alabama Supreme Court's decision below "overrule" or conflict with this Court's decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999)?

VII.

Does the Alabama Supreme Court's decision below conflict with this Court's decisions in *F.S. Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Plyler v. Doe*, 457 U.S. 202 (1982); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1984); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968); *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936); *Zobel v. Williams*, 457 U.S. 62 (1982); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); or *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918)?

THE COUNTY'S CORRECTION OF PETITIONERS' CERTIFICATE OF INTERESTED PERSONS

The County's counsel listed in the Petition should include the following:

J. Vernon Patrick, Jr.
Jeffrey V. Havercroft
Matthew T. Franklin

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JEFFERSON COUNTY'S CORRECTIONS TO PETITIONERS' STATEMENT OF THE CASE

I. The County's corrections to petitioners' statement of prior proceedings

A. This Court did not articulate the basis for its 1996 order limiting oral argument

In an effort to persuade this Court that Jefferson County's occupational tax raises novel and important questions which should be, but have not been, settled by this Court, the Petition argues (at p. 2):

> This Court granted certiorari on the *res judicata* issue and also on the exact equal protection issue which is now embraced by this petition. *Richards*, 516 U.S. 983 (1995). But before oral argument, this Court determined that neither the trial court nor the Alabama Supreme Court had opportunities to address the merits of petitioners' equal protection claims, and on that basis dismissed the writ as improvidently granted. *Richards*, 516 U.S. 1167 (1996). . . .

It is far from clear that the Petition correctly states the "basis" for this Court's 1996 Order directing the parties to limit oral argument to the *res judicata* issue. The 1996 Order may well have been prompted by the County's having demonstrated that petitioners Richards et al. had erroneously represented to this Court (at p. 8 of petitioners' Brief on the Merits submitted to this Court in 1996 in connection with *Richards v. Jefferson County*, 517 U.S. 793 (1996)) that Section 1(B) of Ordinance No. 1120 not only exempted "insurance companies, express companies, railroads, banks and pubic utilities" but also "completely exempts, without explanation, all employees

of these powerful business interests. . . . " The employees are not now exempt and never have been exempt.

B. The decision below does not overrule or conflict with this Court's *Acker* decision

The Petition (at p. 3) erroneously states that the Alabama Supreme Court's June 22, 2001, Opinion below:

> rejected this Court's factual interpretation of the same tax and exemption scheme set forth in *Jefferson County v. Acker*. . . .

The opinion below for the Alabama Supreme Court does not cite or discuss this Court's opinion in the *Acker* case. In *Parker v. Jefferson County*, ___ So. 2d ___ (Ala. Nov. 7, 2000) [Resp. App. 1-6.], *rehearing denied*, ___ So. 2d ___ (Ala. April 20, 2001) [Resp. App. 7 ff.][1] – an independent case generated by an opportunistic response to this Court's *Acker* opinion – the Court had earlier concluded that the *Acker* opinion dealt solely with a question of federal law in holding that the County's occupational tax constituted a non-discriminatory, revenue-raising tax to which Congress had consented in the Public Salary Tax Act, 4 U.S.C. § 111. This Court noted in *Acker* that the Public Salary Tax Act "does not require the local tax be a typical 'income tax'." 527 U.S. at 442.

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[1] References to the Appendix to the Petition, which is bound with the Petition, are indicated by Pet. App., followed by the relevant page numbers in the Appendix (e.g., Pet. App. 2-36). References to the Appendix to Jefferson County's Brief in Opposition, which is separately bound with an orange cover, are indicated by Resp. App., followed by the relevant page numbers in the Appendix (e.g., Resp. App. 1-6).

Applying Alabama law, the Alabama Supreme Court held, in *Parker*, that Jefferson County's Ordinance No. 1120 serves a revenue raising function, but is valid under Alabama law because it imposes permissible "occupational" or "privilege" taxes or "licensing fees" rather than impermissible "income taxes." Chief Justice Moore dissented from the opinion below in this case and also dissented from the Alabama Supreme Court's opinion denying rehearing in *Parker*.

II. The County's corrections to petitioners' statement of facts

Petitioners' Statement of Facts (at pp. 3-8 of the Petition) is misleading when it argues (at p. 5) that:

> At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of "loopholes" for a "sizable number of professions, with no apparent rationale."

A former county commissioner merely testified at trial he did not understand the rationale for exempting "lawyers, sleight-of-hand artists, psychic healers and playing card salesmen." The former commissioner's testimony is irrelevant, because the Legislature, not the County Commission, had mandated in Act No. 406 (Ala. Acts 1967) that lawyers, doctors, and other professionals already being taxed by the State, as well as other specified businesses and occupations that had been subject to state and county business license taxes since 1935 (Ala. Code 1975, Tit. 40, Chap. 12, Art. 2), should be exempted from the new license taxes that the Legislature by Act No. 406 was then

authorizing the County to levy on previously exempt businesses.

The Petition (at p. 7) misstates the record in purporting to summarize the testimony of the "county's chief financial officer." In fact, the cited testimony was given by Wayne Averitt,[2] the Chief Financial Officer of the Birmingham-Jefferson Civic Center Authority. [Resp. App. 13-26.] Moreover, the hotel referred to in the Petition (at p. 7) was purchased by the Civic Center Authority out of its bond proceeds, and not by the County out of tax revenues, as misrepresented by the Petition. [Resp. App. 22.]

The Petition (at p. 8) misstates the testimony of Edwin A. Strickland, the County Attorney. In his testimony, Mr. Strickland did *not*, as the Petition (at p. 8) claims, express the "opinion that the purpose of the tax is to raise revenue and exercise police power." Instead, Mr. Strickland testified as follows (at pp. 555-556) of the trial transcript [Resp. App. 61-62.]:

> Q. Based on your reading of Act 406, what is its purpose? Does it have the purpose of raising revenue, the purpose of regulating occupations in Jefferson County, or some combination of both?
>
> A. I think its purpose is to raise revenues.
>
> Q. That's purely its function in your evaluation?
>
> A. It is.

---

[2] The trial transcript contains a number of misspellings, including the name of Mr. Averitt.

* * *

Q. And did the County Commission in 1987 adopt Ordinance 1120 for the sole purpose of raising revenues?

A. That's correct.

ARGUMENT

I. This case does not merit review by certiorari because the decision below does not conflict with prior decisions of this Court or raise a novel question which has not been, but should be, settled by this Court.

Rule 10 of this Court's Rules, read in conjunction with 28 U.S.C. § 1257, makes it clear that

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.

Rule 10 goes on to provide that this Court may, in the exercise of its discretion, grant certiorari when a state court of last record has decided an important federal question "in a way that conflicts with relevant decisions of this Court" or has decided an important question of federal law "that has not been, but should be, settled by this Court."

The Alabama Supreme Court's opinion below does not involve a new and novel question that has not been, but should be, settled by this Court. Instead, the opinion below follows, and properly applies, long-established and well-

settled rules of law established by this Court's prior decisions in holding that the exemptions mandated by Section 4 of Act No. 406 enacted at the Regular Session of the Legislature of Alabama (hereinafter "Act No. 67-406") and the exemptions allowed by Section 1(B) of Ordinance No. 1120 enacted by the Jefferson County Commission on November 6, 1987 (hereinafter "Ordinance No. 1120") do not violate the Equal Protection Clause of the Fourteenth Amendment.

The Alabama Supreme Court's decision below does not "overrule" or in any other way conflict with this Court's prior decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999), as argued by petitioners (at pp. i, ii, 3, and 14-16 of their Petition). Because the Petition places such great emphasis on the supposed conflict between the decision below and this Court's decision in *Acker*, we will demonstrate below (in Part III of the Argument) that there is no conflict.

Petitioners cite a number of other decisions of this Court which petitioners argue are in conflict with the Alabama Supreme Court's decision below. None of these decisions exhibit the claimed conflict. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), involved an equal protection challenge to a zoning ordinance; *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936), involved an equal protection challenge to state legislation regulating the price of milk; *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), involved an equal protection challenge to a municipality's demand for an easement in order to obtain access to a municipal water system; and *Plyler v. Doe*, 457 U.S. 202 (1982), involved an equal protection challenge to legislation excluding the children of illegal aliens from obtaining access to the state's public schools.

None of the above cited cases involved the enactment of tax legislation, in which this Court has long recognized that state legislatures have broad discretion. The remainder of the equal protection decisions of this Court cited in the Petition as conflicting with the decision of the Alabama Supreme Court below do not involve occupational taxes, with respect to which this Court has repeatedly held that state and local governments have *particularly* broad discretion, and all of the decisions cited by petitioners are distinguishable. For example, *Zobel v. Williams*, 457 U.S. 62 (1982), involved heightened scrutiny because the state's legislation infringed upon the constitutional right of U.S. citizens to travel or settle in another state.

In addition, petitioners have not carried their burden of showing that Jefferson County's enforcement and collection efforts under Act No. 67-406 and Ordinance No. 1120 deprive petitioners of equal protection, or that the County's collection and enforcement efforts raise novel and important issues which have not been, but should be, settled by this Court.

Petitioners (who are neither "Muslim clerics" nor "tent evangelists") do not have legal standing to seek certiorari with respect to the question whether Muslim clerics and tent evangelists have been deprived of equal protection as a result of the county's enforcement and collection efforts under Act No. 67-406 and Ordinance No. 1120, in light of this Court's prior decisions in *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 180 (1923); and *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915), which impose a "general prohibition on a litigant's raising another person's legal rights" and which establish that "[o]nly those whose rights are

directly affected can properly question the constitutionality of a state statute and invoke [the United States Supreme Court's] jurisdiction in respect thereto".

II. The decision below (which upholds certain tax exemptions mandated by the Alabama Legislature's Act No. 67-406 and other exemptions allowed by the County's Ordinance No. 1120) is consistent with, and supported by, well-established rules of law enunciated in prior decisions of this Court.

Petitioners (plaintiffs below) concede in their Petition to this Court (at p. 8) that petitioners are *not* members of a suspect or quasi-suspect class. Petitioners also concede (at pp. 9-14) that they have the burden to establish that the exemptions of which petitioners complain are so irrational and wholly arbitrary that the exemptions violate the Equal Protection Clause.

In their Petition, the petitioners argue (at pp. ii, 5-8, and 12-15), as they did in the Alabama Supreme Court below, that any appellate court, in reviewing a trial court's determination that a statute or ordinance violates the Equal Protection Clause, is bound by the trial court's finding of fact and conclusions of law, and may not conduct an independent *de novo* review of the facts. The Alabama Supreme Court correctly rejected this argument [*See* Pet. App. 7-10.].

Petitioners argue (at p. 5 of the Petition):

> At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of

> "loopholes" for a "sizable number of professions, with no apparent rationale." (Tr. 32) The only commissioner available at trial who was present when the tax was enacted testified: "I would have a hard time determining what sleight of hand artists, psychic healers, playing card salesmen and lawyers have in common. There is no rationale." (Tr. 39)

Also, at p. 7, the Petition argues that "[n]o expert witness testified that the County's exemption scheme was rational" and argues at p. 14 that it is "impossible" for the County to "articulate a rational basis for its exemption of the odd group it has chosen to evade taxation . . . ".

Nowhere does the Petition mention or discuss the fact that the Alabama Legislature (not the governing body of the County) *mandated* exemptions for persons already subject to the state license tax. Nowhere does the Petition mention or discuss the fact that the lawyers, doctors, and persons engaged in other specified professions whom the Legislature required to be exempted from the County's occupational tax are now being taxed (and since the 1930's have been taxed) by the state pursuant to the State License Code (Ala. Code 1975, Tit. 40, Chap. 12, Art. 2). Moreover, the Petition nowhere discusses prior decisions of this Court which have held that the legislature is vested with discretion in levying taxes, the strong presumption of validity which the judiciary must give to the validity of legislative enactments (*particularly* in the field of taxation), and the fact that the legislature need not articulate or state its rationale for a legislative classification.

As this Court held in its opinion in *FCC v. Beach Communications*, 508 U.S. 307 (1993):

> On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, *see Lyng v. Automobile Workers*, 485 U.S. 360, 370, 108 S. Ct. 1184, 1192, 99 L. Ed. 2d 380 (1988), and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973) (internal quotation marks omitted). *See also Hodel v. Indiana*, 452 U.S. 314, 331-332, 101 S. Ct. 2376, 2387, 69 L. Ed. 2d 40 (1981). Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz*, *supra*, 449 U.S. at 179, 101 S. Ct. at 461. *See Flemming v. Nestor*, 363 U.S. 603, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960). Thus, the absence of " 'legislative facts' " explaining the distinction "[o]n the record," 294 U.S. App. D.C. at 389, 959 F.2d at 987, has no significance in rational-basis analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S. Ct. 2326, 2334, 120 L. Ed. 2d 1 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

> data. *See Vance v. Bradley, supra,* 440 U.S. at 111, 99 S. Ct. at 949. *See also Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S. Ct. 715, 723, 66 L. Ed. 2d 659 (1981). " 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' " *Lehnhausen, supra,* 410 U.S. at 365, 93 S. Ct. at 1006 (quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 510, 57 S. Ct. 868, 872, 81 L. Ed. 1245 (1937)).

508 U.S. at 314-15.

Earlier, this Court held in *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. 232, 237 (1890):

> [The Equal Protection Clause] was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. . . . *It may impose different specific taxes upon different trades and professions* and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature. . . . We think that we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure

> equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt. [Emphasis added.]

See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937):

> *It is inherent in the exercise of the power to tax that a state be free to select the subject of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation.* [Citations omitted.] This Court has repeatedly held that *inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation.* [Citations omitted.] [Emphasis added.]

It is well established that a state does not deny equal protection of the laws merely because the state (a) imposes a license tax on a class of persons engaged in one business but exempts others engaged in a similar business, or (b) discriminates in favor of one class and against another class of persons. *See, e.g., Quong Wing v. Kirkendall*, 223 U.S. 59, 62-64 (1912) (upholding a statute which levied a license tax on persons working in hand laundries, but which exempted those persons working in steam laundries); *Bradley v. City of Richmond*, 227 U.S. 477 (1913); *Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910); *Williams v. Fears*, 179 U.S. 270 (1900).

This venerable rule has been repeatedly reaffirmed by this Court:

> " 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.*' " [Emphasis added.]

Leathers v. Medlock, 499 U.S. 439, 451 (1991) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547-48 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940))).

Moreover, as this Court has frequently observed:

> A state may exercise a wide discretion in selecting the subjects of taxation . . . [Citations omitted.]*"particularly as respects occupation taxes"*. [Emphasis added.]

New York Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 179 (1923).

In *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910), this Court reasoned:

> A very wide discretion must be conceded to the legislative power of the states in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.

Furthermore, as this Court observed in *Carmichael v. Southern Coal & Coke Co., supra* at 509:

> A *legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.* [Emphasis added.]

Likewise, in *New York Transit Corp. v. City of New York, supra* at 578, a tax classification subject to rational basis review must be held valid "if any state of facts reasonably can be conceived that would sustain it".

It is wholly irrelevant, therefore, that a former county commissioner testified below that he did not understand the rationale for the exemptions for lawyers, sleight-of-hand artists, etc. After all, those exemptions were *not* the result of an "exemption scheme" devised by the Jefferson County Commission, but instead were *mandated* by the Alabama Legislature. As part of the general revenue act of 1935, the Alabama Legislature enacted the State License Code (now codified as Ala. Code 1975, Tit. 40, Chap. 12, Art. 2) under which state-licensed professionals (such as attorneys, doctors, architects and accountants),

together with many ordinary businesses (such as abstract companies, building contractors, lumberyards, service stations, etc.), were (and are today) required to pay license taxes to the state for the purpose of raising revenue and not for the purpose of regulation. The State License Code also included a number of marginal and transient occupations and businesses – common in the 1930s but sounding quaintly anachronistic today – such as fortune tellers, itinerant peddlers, magic shows, transient moving picture shows, and vaudeville shows. Except for certain specified state-licensed professionals, the State License Code also levies on the state taxpayers a "piggy back" tax that is paid to the counties of the state.

Act No. 67-406 was enacted in 1967 to enable the County to levy business license taxes – including occupational taxes on those natural persons who work in an employer-employee relationship – on all persons who were not covered by the State License Code and who had therefore escaped paying any license taxes to the County since the Code's 1935 inception. Act No. 67-406 specifically authorized the County to "levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended". Thus, all the businesses that were then, and continue now to be, taxed under the State License Code were specifically exempted from the County's taxing authority conferred by Act No. 67-406.

The marginal or transient businesses put into the State License Code in 1935 have not been since removed by the Legislature, and their continued inclusion in the State License Code meant that they could not be separately or additionally taxed by the County pursuant to its new (in 1967) authority under Act No. 67-406. The historical inclusion of these marginal businesses in the State License Code gives the plaintiffs the opportunity to assemble colorful lists of businesses exempt from Act No. 67-406 and falsely claim that the occupational tax – since it must exempt natural persons who pursue those businesses as sole proprietors – is levied on an irrational collection of taxpayers. In fact, and as fully demonstrated by the record in this case, the occupational tax (with the exception of certain state-licensed professionals) is levied on the compensation of every natural person who works in Jefferson County as an employee of any business entity that is legally distinct from its employees. People who conduct their business as sole proprietors do not pay the occupational tax because, by the terms of Ordinance No. 1120, they are not employees and because, as sole proprietors, they pay business license taxes under either the State License Code or the County's business license code implemented in 1968 pursuant to Act. No. 67-406.

Even though business license taxes and the County's occupational tax are merely subcategories of the general category of privilege, excise and license taxes, several practical distinctions between these two categories are relevant to understanding this case. Unlike business license taxes which are levied on the legal entities (e.g., corporation, partnership or sole proprietor) that conduct particular businesses, the occupational tax is levied only

on natural persons who work as employees. Further, while business license taxes are levied at different rates using various indices reflecting the scale and nature of the businesses, the occupational tax is uniformly levied on all employees at the same rate (1/2 of 1% of compensation earned within the County) without distinction as to the kind of work they perform. Jefferson County, with only the limited exceptions explained below, has levied and collected, and continues to levy and collect, the occupational tax from every person who works as an employee in the County – more than 400,000 persons in 1997 as shown by the evidence presented at trial. Godeke Testimony [Resp. App. 26-39.]; Defendant's Exhibit 9 [Resp. App. 101-108.]; Defendant's Exhibit 12 [Resp. App. 109-110.].

As recognized by the Alabama Supreme Court in its opinion below [Pet. App. 15.], the occupational tax is levied and collected with only the following exceptions: (i) individuals who do business as sole proprietorships and pay taxes to the County under its general business license code authorized by Act. No. 67-406; (ii) individuals who do business as sole proprietorships and pay taxes under the State License Code, which in most instances include "piggyback" taxes to the County; (iii) individuals engaged in certain learned professions (e.g., lawyers, doctors, accountants, architects, etc.) who are required to pay state license taxes and are expressly protected by state law from taxation by the County; and (iv) persons who are employed as domestic workers in

private homes and are expressly exempted from the occupational tax by Ordinance No. 1120.[3] The trial record shows that, at the time of the trial in 1997, the working population of the County – more than 400,000 people – contained 9,004 sole proprietors who did not pay the occupational tax because they paid a County business license tax instead, 11,556 sole proprietors subject to state and "piggyback" county license taxes who did not pay the occupational tax, and 7,835 state-licensed professionals who paid state license taxes and were exempted by state law from county taxation.

As recognized in *Estes v. City of Gadsden*, 266 Ala. 166, 94 So. 2d 744 (1957), the seminal Alabama case concerning occupational taxes, there are at least three rational bases for legislating an exemption from the occupational tax for the self-employed who pay existing business license taxes, which is the situation pertaining to those exempt persons described in clauses (i) and (ii) of the preceding paragraph. First, the exemption avoids having to disturb business license tax classifications – established antecedent to the levy of the occupational tax – by economically integrating such classifications with the occupational tax; second, it avoids double taxation of the self-employed who already pay a business license tax; and third, it reflects the legislative judgment that a different rate of occupational tax can be justified, if applied to

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[3] Although ordained ministers are not expressly exempted from the occupational tax by Act. No. 67-406 or Ordinance No. 1120, the Alabama Supreme Court interpreted the County's failure to date to enforce the tax against ordained ministers as a recognized exemption. See part IV of the Argument in this brief.

gross compensation as a measure of the tax, because sole proprietors have expenses in the operation of their businesses, while employees are taxed on a salary free of expenses.

Numerous reasons can be adduced as a rational basis for the Alabama Legislature's decision, going back to 1927, to exempt state-licensed professionals from county taxation. By modern standards, the state's regulation of these professions was embryonic when the tax exemption was first instituted. Recognizing that the imposition of license taxes on the learned professions should either be a part of the state regulatory system or should be controlled in a manner so that it did not impede objectives of the regulatory system, the Legislature could have rationally concluded that counties should not be permitted to tax independently the learned professions. By analogy to the right of travel that is an important incident of national citizenship, *Zobel v. Williams, supra,* it is readily conceivable that, as a further rational basis for prohibiting county taxation of professionals, the Legislature believed that the welfare of the people would be served by allowing doctors, lawyers, engineers and architects, etc. to perform their work all over the state without having to worry about local taxes. Even if such taxes are not economically oppressive, they could still be an impediment to the statewide availability of professional services because they require local knowledge, the completion of unfamiliar paperwork, and the risk of prosecution for noncompliance.

Concerning a rational basis for exempting domestic workers in private homes from the occupational tax, no

better statement can be found than that of this Court in *Carmichael v. Southern Coal & Coke Co., supra* at 513:

> Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax.

In its opinion below, the Alabama Supreme Court concluded that:

> . . . the prohibition found in Act 406 against further taxation of persons engaged in professions and occupations subject to the state-licensing requirements furthers several possible legitimate governmental purposes. These governmental purposes may be those of economic development, statewide uniformity, or the protection of a future source of tax revenue. Any one of these purposes, or all of them, could serve as the rational and legitimate basis of the exempt classifications created by Act 406 (and adopted by legislative mandate in Ordinance No. 1120), which prohibits further taxation of persons engaged in the specified professions and occupations. Because we conclude that a fair and rational basis supports the challenged classification, we conclude that the *Richards* class has not met its burden of negating any conceivable set of facts that would support this challenged classification.

Pet. App. 24.

III. The Alabama Supreme Court's decision below is not in conflict with, and does not purport to "overrule", this Court's decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999).

The petitioners' Petition for certiorari erroneously argues (at pp. i, ii, 3, and 14-16) that this Court held in *Jefferson County v. Acker*, 527 U.S. 423 (1999), that Jefferson County's occupational tax "is an income tax and not a business license tax."

Since the Public Salary Tax Act does not use the term "income tax" it was unnecessary for this Court, in its opinion in *Jefferson County v. Acker, supra*, to decide whether the County's occupational tax is an "income tax," and this Court did not do so. Instead, this Court concluded in its opinion in *Acker* that Congress had consented to the County's taxation of "pay or compensation for personal services" rendered within Jefferson County by U.S. District Judges Acker and Clemon. In reaching this conclusion, this Court stated in its *Acker* opinion:

> [T]here is no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local office-holders whose services are rendered within the county.

527 U.S. at 443-44.

This Court did *not* hold in *Acker* that the County's occupational tax imposed by Ordinance No. 1120 violates the Alabama Constitution or violates Alabama law, or is an "income tax" under Alabama law. Instead, this Court upheld the occupational tax on the compensation of federal judges based upon the Court's conclusion that, as a

matter of *federal* law, the United States had *consented* to the imposition (by the state or by a political subdivision thereof or by an agency or instrumentality of one or more of the foregoing) of a nondiscriminatory tax levied for revenue purposes on, measured by, or with respect to gross receipts or compensation.

This Court's opinion in *Acker* discusses, and is consistent with, this Court's earlier decision in *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624 (1953), upholding a license fee or privilege tax imposed by state or local governments on the ground that Congress had consented, in 4 U.S.C. § 106(a) (the "Buck Act"), to the imposition of state or local taxes "levied on, with respect to, or measured by, net income, gross income, or gross receipts" (which were defined as an "income tax" as a matter of federal law for purposes of the Buck Act by 4 U.S.C. § 110(c)). The majority's opinion in *Acker* noted that this Court had earlier concluded in *Howard* that Congress had consented to the imposition of a tax measured by income even though the local tax was styled as "a tax upon the privilege of working within [the municipality]" and even though the local tax was not considered an "income tax" under state law. 527 U.S. at 438. In *Acker*, this Court concluded that Jefferson County's occupational tax "serves a revenue-raising, not a regulatory, purpose." 527 U.S. at 440.

In the present case, petitioners (at pp. i, ii, 3, and 14-16) argue that the Alabama Supreme Court's decision below "overrules" or is in conflict with this Court's decision in *Jefferson County v. Acker, supra*, based on petitioners' premise that the County's occupational tax must be regulatory if it is a license tax or, alternatively, an

income tax if it merely raises revenue. Petitioners' premise is incorrect. *See, e.g., Black's Law Dictionary* (6th ed. 1990), which defines "license tax" as follows:

> The term "license tax" includes both a charge imposed under [the] police power for the privilege of obtaining licenses to conduct particular businesses, and taxes imposed upon businesses for [the] sole purpose of raising revenue.

As the Alabama Supreme Court noted in its November 17, 2000 opinion in *Parker v. Jefferson County* [Resp. App. 1-6.], the County's occupational tax imposes "a tax upon the privilege of working"; is not an "income tax" as defined under state law; and deviates from "textbook income tax characteristics" in that the occupational tax is measured by one-half of one per centum of "earned compensation," rather than being measured by "income" from all sources, including dividends, interest, rental income, and capital gains. The Alabama Supreme Court's November 17, 2000 opinion in the *Parker* case was entirely consistent with prior decisions of the Alabama Supreme Court which have held that an occupational tax is not, as a matter of Alabama law, an "income tax." *See, e.g., Estes v. City of Gadsden, supra; McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972); and *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). Moreover, the Alabama Supreme Court's November 17, 2000 opinion in *Parker* is consistent with prior decisions of this Court, including *Philadelphia & Southern Mail S.S. Co. v. Commonwealth of Pennsylvania*, 122 U.S. 326, 345 (1887), in which this Court held unconstitutional a tax equal to eight-tenths of one per centum of the gross receipts from the

business of transporting freight or passengers. In its *Philadelphia & Southern Mail S.S. Co.* opinion, this Court held that the Pennsylvania tax:

> . . . is not an income tax in the class to which it refers, but [is] a tax on their receipts for transportation only. Many of the companies included in it may and undoubtedly do have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. . . . It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

IV. Petitioners are not "Muslim clerics" or "tent evangelists". Accordingly, petitioners do not have legal standing to seek certiorari with respect to whether the County's enforcement and collection efforts deprive "Muslim clerics" and "tent evangelists" of equal protection.

At pp. ii, 6, 8, 13, and 14, the Petition seeks a writ of certiorari based on petitioners' argument that Jefferson County's *enforcement* of its occupational tax violates the Equal Protection Clause, because the County has thus far not brought enforcement actions against ordained ministers who have failed to pay the occupational tax. The Petition argues (at pp. 13-14) that the County's enforcement of its occupational tax denies equal protection of laws to "Muslim clerics", "tent evangelists", and other preachers who don't evade this tax.

During the trial below, Randy Godeke, the County's Director of Revenue, who is responsible for collecting the

occupational tax, and Edwin A. Strickland, the County Attorney, testified that Ordinance No. 1120 and Act No. 67-406 do not exempt preachers or ministers of religion, that some ministers pay the tax, while others do not, and that the County has thus far not brought enforcement or collection proceedings seeking to collect the occupational tax from ministers or from churches which employ ministers, because of legal uncertainties involving the First Amendment. [Resp. App. 74-78.]

A number of reported court decisions involve whether the First Amendment to the United States Constitution prohibits cities and counties from levying a license or privilege tax on ministers. *See, e.g., Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). *See also Jones v. City of Opelika*, 319 U.S. 105 (1943); *Baylor v. Centre County* (Commonwealth Court of Pennsylvania), 1993 WL 73687 (decided March 18, 1993); *Stajkowski v. Carbon County Board of Assessment*, 541 A.2d 1384 (Pa. 1988); *Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990); *DHR of Oregon v. Smith*, 494 U.S. 872 (1990); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943). In light of these court decisions, and the potential legal costs, time commitments, and risks which are inherent in any litigation, it is entirely understandable, and well within the discretion of the County's law enforcement authorities, that the County has thus far not filed litigation seeking to collect the occupational tax from ministers (or from the churches which employ them).

The trial judge below, Circuit Judge John E. Rochester, did not in his November 12, 1998 Judgment or in his June 17, 1999 Order below mention, discuss or decide

whether ministers should or should not be required to pay the occupational tax or should or should not be exempted therefrom. The County took an appeal from Judge Rochester's June 17, 1999 Order (and his November 12, 1998 Judgment) to the Alabama Supreme Court (No. 1981680) below, arguing that the trial court below erred in enjoining the County from continuing to collect the occupational tax unless the County began collecting that tax from persons exempted by Section 4 of Act No. 67-406 and Section 1(B) of Ordinance No. 1120 and, further, erred in holding that Section 4 and Section 1(B) violated the Equal Protection Clause. Section 4 of Act No. 67-406 and Section 1(B) of Ordinance No. 1120 do not exempt preachers. The County's failure to collect, or to bring enforcement proceedings seeking to collect, the occupational tax from ministers is irrelevant and immaterial to the petitioners' Petition for certiorari to this Court.

The Petition argues (at p. 6 and at p. 13) that "no preachers have any rational basis for evading taxation, whether ordained or not, but some do. Preachers who don't evade this tax are discriminated against on an 'ordination' basis which Jefferson County has established on a completely arbitrary and irrational basis."

At p. 4, the Petition asserts that the plaintiff Richards is a law firm courier, and the original complaint [Pet. App. 43.] asserts that the plaintiff Fannie Hill is a domestic servant. Nowhere does the Petition contend that any petitioner is a "Muslim cleric" or a "tent evangelist" or a "minister", whether ordained or not.

Accordingly, petitioners lack legal standing to seek certiorari from this Court with respect to whether Jefferson County's enforcement of its occupational tax deprives "Muslim clerics" or "tent evangelists" or "ministers" of equal protection. *See, e.g., Hendrick v. Maryland*, 235 U.S. 610, 621 (1915):

> If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the state we will not assume that, upon a proper showing, this will be denied. . . . Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto.

Accord, Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 181 (1923):

> It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened. *The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question.* We accordingly leave it entirely open. [Emphasis added.]

V. The exemptions mandated by Section 4 of Act No. 67-406, the exemptions allowed by Ordinance No. 1120, and the County's enforcement and collection efforts to date with respect to the County's occupational tax do not deprive petitioners of equal protection and do not raise novel and unsettled questions which warrant, require or justify issuance of the writ of certiorari requested by petitioners (plaintiffs below).

The Petition argues (at p. 14) that even if Jefferson County could do the impossible, and could articulate a rational basis for the exemptions from the occupational tax, the County's enforcement of the tax would nevertheless violate the Equal Protection Clause. As noted above, this argument ignores the fact that the Alabama Legislature (rather than the County) exempted from further taxation by the County those persons already being taxed pursuant to the State License Code, including attorneys, doctors and certain other state-licensed professionals.

Petitioners engage in hyperbole when petitioners suggest (at p. 14) that this Court has recently addressed, in its *per curiam* opinion in *Village of Willowbrook v. Olech, supra,* the "gravity" of the petitioners' argument that Jefferson County's *enforcement* of its occupational tax violates the Equal Protection Clause and raises questions which are so serious and so important as to merit this Court's issuance of a writ of certiorari for review of this case.

As noted in part IV of the Argument, the trial judge below did not address the County's enforcement and collection efforts and did not make any rulings or make any findings of fact or rulings of law with respect to such

efforts. Instead, the trial judge held that the exemptions *expressly* mandated by Section 4 of Act No. 67-406 and the exemptions *expressly* allowed by Section 1(b) of Ordinance No. 1120 violated the Equal Protection Clause. The appeal by Jefferson County to the Alabama Supreme Court and the opinion below of the Alabama Supreme Court did not address the County's enforcement and collection efforts.

The petitioners (plaintiffs below) are not federal judges, corporate house counsel, nurses, geologists, investment brokers, administrative officers, teachers, police officers, or real estate appraisers. Accordingly, petitioners lack standing to invoke the jurisdiction of this Court to decide whether the County's enforcement efforts unlawfully discriminate against federal judges, nurses, geologists, etc. *See Hendrick v. Maryland, supra;* and *Oliver Iron Mining Co. v. Lord, supra.*

In fact, this Court has already decided, in *Jefferson County v. Acker, supra,* in which two federal judges were before this Court, that Jefferson County may properly collect and enforce its occupational tax against federal judges. There is no need for this Court to revisit that issue.

CONCLUSION

Petitioners have failed to raise any novel or "unsettled" question which has not been, but should be, settled by this Court.

Moreover, petitioners have failed to show that the Alabama Supreme Court decided the issues presented below in a way which conflicts with any relevant decision of this Court. Accordingly, Jefferson County respectfully submits that this Court should deny both the instant Petition for a Writ of Certiorari and the petitioners' alternative request that this Court reinstate the writ of certiorari previously granted with respect to the equal protection question in 1995 and subsequently dismissed as improvidently granted in its order in *Richards v. Jefferson County, Alabama*, 516 U.S. 1167 (1996).

Respectfully submitted,

WILLIAM M. SLAUGHTER
Counsel of Record
J. VERNON PATRICK, JR.
HASKELL SLAUGHTER YOUNG & REDIKER, L.L.C.
1200 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203-2618
(205) 251-1000

Attorneys for Respondent Jefferson County, Alabama

EDWIN A. STRICKLAND
JEFFREY M. SEWELL
CHARLES S. WAGNER
Jefferson County Attorney's Office
Jefferson County Courthouse
716 Richard Arrington Boulevard
Room 280
Birmingham, Alabama 35203
(205) 325-5688

Attorneys for Respondent Jefferson County, Alabama

(3)

No. 01-370

Supreme Court, U.S.
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In The

Supreme Court of the United States

JASON RICHARDS, ET AL.,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

APPENDIX TO JEFFERSON COUNTY'S BRIEF IN OPPOSITION

WILLIAM M. SLAUGHTER
Counsel of Record
J. VERNON PATRICK, JR.
HASKELL SLAUGHTER YOUNG & REDIKER, L.L.C.
1200 AmSouth/Harbert Plaza
1901 6th Avenue North
Birmingham, Alabama 35203-2618
(205) 251-1000

Attorneys for Respondent Jefferson County, Alabama

EDWIN A. STRICKLAND
JEFFREY M. SEWELL
CHARLES S. WAGNER
Jefferson County Attorney's Office
Jefferson County Courthouse
716 Richard Arrington Boulevard
Room 280
Birmingham, Alabama 35203
(205) 325-5688

Attorneys for Respondent Jefferson County, Alabama

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1991004

Carnesa T. Parker

v.

Jefferson County

Appeal from Jefferson Circuit Court
(CV-99-3575)

(Filed Nov. 17, 2000)

MADDOX, Justice.

This appeal presents the following issue: Whether Jefferson County Ordinance No. 1120 (the "ordinance"), adopted September 29, 1987, imposes an occupational tax, which a county is permitted by Alabama law to impose, or whether the ordinance imposes an income tax, which

Alabama law prohibits a county from imposing.[1] We conclude, as did the trial judge, that the ordinance does not impose an income tax, and, therefore, is not prohibited by Alabama law. We affirm the judgment of the circuit court dismissing the action.

Carnesa Parker sued Jefferson County, alleging that the tax imposed by the ordinance was an income tax prohibited by Alabama law. Parker sought a complete refund, with interest, of all amounts she had paid to Jefferson County under the ordinance, and she sought to have a class certified under Rule 23, Ala. R. Civ. P., consisting of all persons who had paid the tax.

The crux of Parker's argument is that the United States Supreme Court, in *Jefferson County v. Acker*, 527 U.S. 423 (1999), determined that the ordinance imposes an income tax, and that the doctrine of collateral estoppel bars Jefferson County from relitigating this issue. The trial court correctly rejected Parker's argument.

> " 'Collateral estoppel requires (1) an issue identical to one litigated in the prior suit; (2) that the issue [have] been actually litigated in the prior suit; and (3) that the resolution of that issue have been necessary to the prior judgment. In addition, the parties must have been the same in both suits. Where these elements are present, the parties are barred from relitigating issues actually litigated in a prior suit.' "

---

[1] See *Estes v. City of Gadsden*, 266 Ala. 166, 170, 94 So. 2d 744, 747 (1957) ("municipalities and counties being political subdivisions of the state have no inherent power of taxation but have only such taxing power as is delegated to them by the legislature").

Jones v. Blanton, 644 So.2d 882, 886 (Ala. 1994), quoting *Lott v. Toomey*, 477 So.2d 316, 319 (Ala. 1985). (Emphasis omitted.) We have carefully reviewed the record on appeal and have considered Parker's argument, and we conclude that she has failed to show that the doctrine of collateral estoppel should be applied in this case, as we shall now show.

The issue relating to Parker's argument in this case that the United States Supreme Court addressed in *Acker* was whether the ordinance was valid against federal employees, under the Public Salary Tax Act, 4 U.S.C. § 111. Under that Act, the United States "consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." In *Acker*, two federal judges were challenging the Jefferson County ordinance.

In addressing this issue, the Court in *Acker* stated:

> "In *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624 (1953), the Court held that a 'license fee' similar in relevant respects to Jefferson County's was an 'income tax' for purposes of a federal statute that defines 'income tax' as 'any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts,' 4 U.S.C. § 110(c). See 344 U.S., at 625, n. 2, 629. The Court so concluded even though the local tax was styled as 'a tax upon the privilege of working within [the municipality],' was not an 'income tax' under state law, and deviated from textbook income tax characteristics.

Id., at 628-629; see also *id.*, at 629 Douglas, J., dissenting) ('Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in [the municipality].').

"As *Howard* indicates, whether Jefferson County's license tax fits within the Public Salary Tax Act's allowance *is a question of federal law.*"

527 U.S. at 438-39. (Last emphasis added.) After determining that the ordinance serves a revenue-raising purpose, not a regulatory purpose, the Court explained:

"We consider next the judges' argument that the wholesale exemption for those who hold another state or county license reveals the Ordinance's true character as a licensing scheme, not an income tax. If the tax were genuinely an income tax, they urge, those license holders would not be excluded, although they might be allowed to claim their other license fees as credits or deductions against the county tax. Alabama's enabling Act does not allow its counties to so provide; those otherwise subject to license or privilege taxes under Alabama's laws may not be reached by a county's occupational tax. See 1967 Ala.Acts 406, § 4. *The dispositive measure, however, is the Public Salary Tax Act, which does not require the local tax to be a typical 'income tax.' Just as the statute in* Howard *consented broadly to 'any tax measured by net income, gross income, or gross receipts,' 344 U.S., at 629, the Public Salary Tax Act consents to any tax on 'pay or compensation,' which Jefferson County's surely is.* The sole caveat is that the tax 'not discriminate . . . because of the [federal] source of the pay or compensation'. . . . "

527 U.S. at 441-42. (Some emphasis added.)

It seems apparent that, contrary to Parker's assertion, the Supreme Court in *Acker* addressed only one question: Did the ordinance violate the Public Salary Tax Act, a federal law? As the above-quoted portions of *Acker* indicate, the Court emphasized that the question it was addressing related to federal law, not state law. To further illustrate this point, the Court in *Acker* cited its prior decision in *Howard*, a case that had addressed an issue similar to the one presented by this appeal.

In *Howard*, the Court held that a Louisville, Kentucky, occupational tax or licensing fee was an "income tax" for purposes of the Buck Act (a federal law similar to the Public Salary Tax Act involved in the *Acker* case), despite the fact that the Kentucky Court of Appeals had held that the tax was not an income tax under Kentucky law, but was a tax upon the privilege of working within the City of Louisville. 344 U.S. at 628-29. The Court emphasized that the question it was addressing was "whether the tax [at issue] was an income tax within the meaning of the federal law." *Id.*, at 629.

The holding in *Acker* was similar to the holding in *Howard* – that the ordinance, which serves a revenue-raising function, did not violate federal law. The Court did not address the issue whether the ordinance was valid under Alabama law (i.e., whether the ordinance imposed an "income tax" that was impermissible under Alabama law).

Applying Alabama law, this Court has upheld ordinances similar to the ordinance at issue in this case, as imposing permissible "occupational" or "privilege" taxes

or "licensing fees" rather than impermissible "income taxes." See *Estes v. City of Gadsden*, 266 Ala. 166, 94 So. 2d 744 (1957), and *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972). This Court has also upheld as constitutional Act No. 406, 1967 Ala. Acts (the Act under which Ordinance No. 1120 was promulgated), which authorized Jefferson County to levy a privilege tax "upon any person for engaging in any business [or occupation]." *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988).

After carefully studying the prior decisions of this Court, as well as the *Acker* and *Howard* decisions of the United States Supreme Court, we conclude that the trial court correctly dismissed Parker's action. Consequently, the judgment of dismissal is affirmed.

AFFIRMED.

Houston, Cook, See, Lyons, Brown, Johnstone, and England, concur.

HOOPER, C.J., dissents.

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1991004

Carnesa T. Parker

v.

Jefferson County

Appeal from Jefferson Circuit Court
(CV-99-3575)

On Application for Rehearing

PER CURIAM.

APPLICATION OVERRULED.

HOUSTON, SEE, LYONS, BROWN, JOHNSTONE, HARWOOD, WOODALL, and STUART, JJ., concur.

Moore, C.J., dissents.

MOORE, Chief Justice (dissenting).

I was not a member of this Court when it released its opinion of November 17, 2000, affirming the judgment of the trial court. I would grant the application for rehearing.

On November 29, 1987, Jefferson County adopted Ordinance No. 1120, a revenue-enhancing measure. Section 1(b) of that ordinance levied a charge on persons doing "any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County." It excepted only (1) domestic servants working in private homes and (2) businesses, professions, and occupations for which license fees are required to be paid under certain named statutes. Section 2, entitled "License Fees Required," set the levy at ½ of 1% of "the gross receipts of each such person." When two federal judges challenged this ordinance in a federal court, Jefferson County asserted that the ordinance imposed an income tax and not a license fee. On its review of the judges' case, the United States Supreme Court stated: "The judges acknowledge that Jefferson County's Ordinance is valid if it 'imposes a true tax on . . . income,' but argue that the Ordinance ranks instead as an impermissible licensing scheme." *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 439 (1999), citing Brief for Respondents 13-14, 27-33. The two plaintiffs, Judge William Acker and Judge U.W. Clemon, specifically referenced the label Jefferson County had used in titling § 2 – "License Fees Required." Jefferson County denied that that title had any meaning on the question whether the moneys collected under the ordinance were collected as fees or were collected as taxes. Jefferson County argued that the charge imposed was, in fact, an income

tax. The United States Supreme Court concluded: "In practice, Jefferson County's license tax serves a revenue-raising, not a regulatory, purpose. Jefferson County neither issues licenses to taxpayers, nor in any way regulates them in the performance of their duties based on their status as licensed taxpayers." *Jefferson County*, supra, at 440. The Supreme Court then upheld this ordinance – precisely because it accepted Jefferson County's contention that the ordinance imposed an income tax.

Now, before this Court, Jefferson County argues that this ordinance imposes a license fee, not an income tax. According to Carnessa Parker's counsel, "Jefferson County having defeated the claims of these federal judges that the tax is a licensing scheme by convincing the [United States] Supreme Court that it is an income tax now seeks to defeat Parker's claims that the ordinance is an income tax by claiming that it is a licensing scheme." Brief of Appellant, 7.

This case thus appears to present the classic foundation for the application of the doctrine of collateral estoppel. That is a kind of equitable relief arising from the need for judicial economy. In *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1199 (Ala. 1978), this Court stated that when the parties in a subsequent case are identical to those in a prior case, the elements necessary for that doctrine to apply are: "(1) an issue identical to one involved in the previous suit; (2) an issue actually litigated in the prior action; and (3) resolution of the issue was necessary to the prior judgment." Then, in *Constantine v. United States Fidelity & Guaranty Co.*, 545 So. 2d 750,

755-56 (Ala. 1989), this Court wrote the following regarding when a decision in a previous case will bind parties in a later case:

> "[T]wo elements are required: 1) the *party claiming the benefit* of the prior judgment as an estoppel against the adversarial party is one who would have been prejudiced by a contrary decision in the previous case; and 2) the *party against whom the estoppel by judgment is sought* either was an actual party in the previous case or was in privity with, or is a successor to the rights of, an actual party in the previous case."

All of these criteria were met in *Jefferson County* and would normally enable Parker to use the doctrine of nonmutual offensive collateral estoppel to bind Jefferson County to the argument it made to the United States Supreme Court. However, Jefferson County has interposed § 100, Ala. Constitution of 1901, as a bar to the application of the doctrine against a county government.

The language of § 100 is ambiguous, and I question whether it reaches this kind of situation. Therefore, I would grant the application for a rehearing, in order to permit the parties to examine the scope of § 100. I am also troubled by the holding that Ordinance 1120 imposes a license fee, not an income tax. By the explicit terms of that ordinance, these taxpayers were obligated to pay a fixed percentage of their incomes, not a flat-rate amount. Similarly situated persons with different incomes would thus pay different sums. In *Estes v. City of Gadsden*, 266 Ala. 166, 172, 94 So. 2d 744, 749 (1957), this Court held that "[t]he character of any tax should be determined by its incidences and not by the name given it or necessarily

the language used." Therefore, I would grant the application for a rehearing on this basis as well.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

JASON RICHARDS, et al,	)	
Plaintiff	)	
vs.	)	*CASE NO.: CV-92-3191*
JEFFERSON COUNTY, et al,	)	
Defendant	)	

REPORTER'S OFFICIAL TRANSCRIPT

BEFORE:

Honorable John E. Rochester
Presiding Circuit Judge
40th Judicial Circuit
Ashland, Alabama 36251
Sitting Specially
October 21, 22, 23, 1997

* * *

[401] BY THE COURT: Call your next witness, please.

MR. SLAUGHTER: Wayne Everette.

WAYNE EVERETTE

(THE WITNESS, AFTER BEING DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, TOOK THE STAND AND TESTIFIED AS FOLLOWS).

EXAMINATION BY MR. STEWART:

Q. State your name, please.

A. I'm Wayne Everette.

Q. And where are you employed?

A. I am the chief financial officer at Birmingham Jefferson Civic Center.

Q. And what do you do as chief financial officer at the civic center?

[402] A. My responsibilities would encompass overseeing payroll, accounts payable, accounts receivable, cash management, investments, bonds.

Q. Are you in charge of overseeing the revenues and expenses of the civic center?

A. Yes, sir.

Q. And the civic center is a quasi-governmental entity located here in Birmingham, Alabama. Is that correct?

A. Yes, sir.

Q. Now long have you been employed by the civic center?

A. Two years.

Q. Prior to that, did you have an association with an accounting firm?

A. Yes, sir.

Q. Are you a certified public accountant?

A. Yes, sir.

Q. And your accounting firm had done some auditing work for the civic center?

A. Yes, sir.

Q. And so you had been familiar with the civic center [403] for how long?

A. Four years.

Q. Okay. Are you familiar with a series of – actually two bond issues that the civic center issued in the year 1989?

A. Yes, sir.

Q. And one of those that's referred to by the civic center as the 1989 bond issue and one the 1989B bond issue?

A. Yes.

Q. And what were those bond issues – what did the civic center use the money for?

A. We purchased a hotel. We built an office building. We built a parking deck and we also extended the civic center, which is called our exhibition hall.

Q. And in preparation for your testimony today, did I ask you to review the books and records of the civic center to get the current status of those bond issues?

A. Yes, sir.

Q. Did you prepare – let me show you what's been marked as Defendants' Exhibit 24 and ask if this [404] the document that you prepared in preparation for the testimony today?

A. Yes, sir.

Q. All right and let's just go through the columns in this. What was the original issue amount of the 1989 bond issue?

A. $83,710,000.

Q. And the 1989B bond issue the original amount?

A. $48,670,000 –

MR. BAXLEY: Your Honor, we have an objection on the relevancy.

MR. STEWART: Your Honor, this directly goes to the interest of the civic center in the case at issue. And the records should reflect the impact of the county occupational tax on the revenues of the civic center.

MR. BAXLEY: Your Honor, what they've done with the tax after they collected it has no bearing whatsoever on whether it's Constitutional.

MR. STEWART: That should have been argued [405] then when the civic center filed its Petition originally. This being the case and the financial impact of the occupational tax on the civic center is a critical issue in this case.

MR. BAXLEY: It's of no issue at all. Now they might have an interest in the outcome of the case, but that

doesn't mean that the evidence is material. And if they said that the state audited by ballfields all over the county. That wouldn't matter whether they put it in the civic center or in ball parks or built a theater or whatever they did with the tax money. So it's irrelevant as to whether it's Constitutional to collect it.

MR. STEWART: The thrust of this testimony goes directly not to how the county has chosen to use the money, but the civic center which has been made a part of this case. There's no objection from [406] the Plaintiff – it's a party to the Defendant in this case and it's relevant to the county as the occupational tax's impact on the civic center is an issue in this case. There's no other way.

BY THE COURT: I'm going to allow the testimony.

Q. And so the two total bond issues were in the amount of $132,380,000?

A. Yes, sir.

Q. Now, have you also in your calculations – how much of the principle amount of these bond issues has been paid to date by the civic center?

A. To date $27,495,000.

Q. And so the outstanding principle balance in total is how much?

A. $104,885,000.

Q. And do your records reflect the total amount of interest which has been paid to date by the civic center to bond holders?

A. Yes, sir.

Q. What is that total amount?

A. The total amount to bond holders is $72,057,876.

[407] Q. And the total remaining debt service to maturity of these bonds, have you calculated that figure and would you give us the total if you have it?

A. The total to maturity $161,138,076.

Q. Now, are you familiar with the manner in which the civic center is making the debt service payments on these bonds?

A. Yes, sir.

Q. Would you tell the Court just how does it work? For example, does the county submit a check and do you receive payment each year from Jefferson County and the City of Birmingham that is used to pay the debt service on these bonds?

A. Yes, sir. We receive two tax proceeds from the city and the county each year to go directly to the trustee of the bonds.

Q. Who is the trustee in the bond documents?

A. Sir?

Q. Who is the trustee?

A. NBC Bank.

Q. National Bank of Commerce?

A. Yes.

[408] Q. All right. And does the payment from the county and the payment from the city come to the civic center or does it go to the trustee?

A. Directly to the trustee.

Q. And then what does the trustee do with it?

A. The trustee pays the bond holders.

Q. They pay the –

A. To the bond holders.

Q. And those payments are due twice a year?

A. Yes, sir.

Q. And exactly how much money has the trustee received on behalf of the civic center from Jefferson County on these bond issues?

A. $85,000,000.

Q. And how much money has been received by the trustee from the City of Birmingham to date?

A. $16,500,000.

Q. $16,500,000?

A. Yes, sir.

Q. And as I understand it, the county – Jefferson County pays a total of $10,000,000 a year to the civic center?

[409] A. Yes, sir.

Q. And the City of Birmingham pays $3,000,000 a year.

A. Yes.

Q. And do you know how long those payments last?

A. The final bond maturity is 2012.

Q. And the original in the 1989 bond issue, the original agreement with the city was 20 payments of $3,000,000. Is that correct?

A. I'm not sure.

MR. STEWART: Your Honor, we would offer Defendants' Exhibit 24. That's the compilation that he just testified from.

BY THE COURT: Any objection?

MR. BAXLEY: Yes, sir, on relevancy.

BY THE COURT: Overruled. It's admitted.

Q. Wayne, I'm going to show you now a document that's marked as Defendants' Exhibit 23 and would you tell the Court what this document is?

A. This is an appropriation agreement between Jefferson County and the civic center.

Q. All right. And is this the agreement that was entered into in 1989 at the same time that the [410] bond issue that whereby the county agreed to pay the sum of $10,000,000 a year to the civic center?

A. Yes, sir.

Q. And this money was to be used as debt service for the 1989 and 1989B bonds?

A. Yes.

Q. And on page 4 of that agreement is there a payment schedule?

A. Yes, sir.

Q. And when did those payments start?

A. 1989.

Q. And when do they end?

A. 2008.

Q. And it's $10,000,000 a year from the 1989 through the year 2008?

A. Yes.

Q. All right.

MR. STEWART: We would offer Defendants' Exhibit 24.

MR. BAXLEY: Objection to relevancy, Your Honor.

[411] BY THE COURT: It's admitted.

Q. I show you what's been marked as Defendants' Exhibit #25 and ask if you're familiar with that document?

A. Yes, sir.

Q. Would you tell the Court what that document is?

A. It's the financial statement dated August 31, 1996.

Q. August 31, 1996. What is the fiscal year for the civic center?

A. August 31.

Q. September 31 through August 31 of the next year?

A. Yes.

Q. So, is this the last year – do you have the 1997 financial statement?

A. This is the last we have.

Q. Are you familiar with this document?

A. Yes, sir.

Q. Did you review this document?

A. Yes, sir.

Q. All right. Let me ask you this. The $10 million you receive each year from the county, which is [412] used to pay the debt service on the bond, if that payment – if those payments were to stop, does the civic center have revenue, dollars, monies available to make the remaining payments to the bondholders for 1989 or the 1989 bond indebtedness?

A. No, sir, we'd be in default. We could not service the debt.

Q. All right.

MR. STEWART: I would offer Defendants' Exhibit #25.

MR. BAXLEY: Object on the grounds of irrelevance, Your Honor.

MR. STEWART: As to relevance, Your Honor, we would argue that it reflects that the civic center, in fact, does not have funds available to make the payments if the revenues were not available.

BY THE COURT: I'll admit it.

MR. STEWART: Thank you, Wayne.

BY THE COURT: Cross examination, Mr. Baxley?

EXAMINATION BY MR. BAXLEY:

[413] MR. BAXLEY: Your Honor, we're asking questions and the only reason we're asking them, is we feel like, you know, we've gone into irrelevant matters. So we think this is going to answer it and we need to ask it.

BY THE COURT: Okay.

Q. Now, you say that the civic center would be insolvent if you didn't get the money from the county?

A. Yes, sir.

Q. Well, the civic center owns – you bought a hotel that you carry on the books worth right at $50 million, don't you?

A. Yes, sir.

Q. That's the Sheraton Hotel, isn't it?

A. Yes, sir, right next to us.

Q. It's operated as a Sheraton with ICC management or Sheraton management right?

A. Yes.

Q. And that hotel was there long before – it was there as a private hotel long before the civic [414] center authority bought it, wasn't it?

A. Yes, sir.

Q. It was there as the Hyatt House, wasn't it, before the civic center had anything to do with it?

A. Yes, sir.

Q. And then it changed over and became a Ramada, didn't it?

A. Yes, sir.

Q. And so now it's the Sheraton.

A. Yes.

Q. But the civic center – you say it's worth right at $50 million?

A. Yes.

Q. Well, if you stopped getting the revenue from this what we say, is an illegal tax, you could sell that hotel and knock out a big chunk of your bond issues, couldn't you?

A. That would offset the balance of the bond issues.

Q. And you say you have an office building also?

A. Yes, sir.

Q. And where's the office – how many stories is that?

[415] A. Ten stories.

Q. Ten stories. And do you lease part of that out?

A. Yes, sir.

Q. Who do you lease – who are some of your tenants?

A. Red Cross, BellSouth, a multitude of others.

Q. The civic center leases office space to BellSouth?

A. Yes, sir.

Q. When was the civic center built? The actual civic center where people could come and go watch events in the concert hall, the children's theater?

A. About '69.

Q. 1969?

A. Yes.

Q. So it was there almost 20 years before this tax that we're complaining about. Is that not correct?

A. Yes, sir.

Q. The hotel and the office building were bought after the tax that we're complaining about – after '87, weren't they?

A. Yes, sir.

Q. When was the hotel bought?

A. '89.

[416] Q. When was your office building constructed and bought?

A. We started construction in '89.

Q. Did I hear you say that you're a CPA?

A. Yes, sir.

Q. You have a license in Alabama?

A. Yes, sir.

Q. Are you required to pay the occupational tax?

A. Yes, sir.

Q. Sir?

A. Yes, sir. As a civic center employee I have to pay it.

Q. Who makes the determination?

A. I can't answer that.

Q. It's deducted from your tax?

A. Yes, sir.

Q. All right. Which firm did you work for before you went to work with the civic center authority?

A. Warren (unintelligible)

Q. Is that the firm that did the audit here?

A. Yes.

Q. If you worked for one of the big two – or any [417] private CPA firm, would you have to pay the occupational tax?

A. I did not pay it.

Q. You did not pay it?

A. No.

Q. Okay.

MR. BAXLEY: That's all.

MR. STEWART: One further question, Your Honor.

EXAMINATION BY MR. STEWART:

Q. Mr. Baxley asked you about the purchase of the hotel and the construction of the office building, those purchases and the expansion of the hotel has actually doubled in size after the 1989 bond issue Is that correct?

A. Yes.

Q. The '89 bond issue funded the purchase and the expansion of the hotel and the building of the office building. Is that correct?

A. Yes.

Q. And one of the purposes of doing that was to try to generate more revenue than this more traditional civic center type operation could produce. [418] Therefore benefiting the city and county –

MR. BAXLEY: Object to a leading question.

BY THE COURT: Sustained.

MR. STEWART: Thank you, Your Honor.

BY THE COURT: May he be excused?

MR. STEWART: Yes, sir.

BY THE COURT: You're free to go. Call your next witness.

MR. SLAUGHTER: Mr. Godeke.

RANDALL GODEKE

(THE WITNESS REMAINS UNDER THE PREVIOUSLY ADMINISTERED OATH)

EXAMINATION BY MR. SLAUGHTER:

Q. Mr. Godeke, I have just handed you a document which I would appreciate your identifying.

A. This is a declaration of Randy Godeke that I prepared and was entered as Director of Revenue.

Q. What – it has attached to it an exhibit and to what calendar year does that exhibit apply?

A. 1994 – Calendar year.

Q. And can you describe that exhibit or describe in your own words what it purports to demonstrate?

A. Sure this is a statistical sampling of various [419] types of employers, listing different companies under various categories and shows the number of employees, the gross wages, the wages subject to the occupational tax, and percentage of wages subject to the occupational tax. And then a designation of a code beside it that indicates the amount of wages or reasonable wages subject to the occupational tax.

Q. This schedule was prepared under your supervision?

A. Yes, it was.

Q. Was it prepared from documents pertaining to the revenue collection and enforcement of the occupational tax?

A. Yes.

Q. Can you describe the circumstances which lead to the need for submission of this document to the U.S. Supreme Court?

MR. BAXLEY: Object, Your Honor.

BY THE COURT: What grounds?

MR. BAXLEY: To ask him to describe the circumstances that lead to the need, Mr. Slaughter, that it ought to be [420] submitted to the Supreme Court of the United States?

BY THE COURT: Do you object to it?

MR. BAXLEY: Well, Your Honor, he's going to say that he filed something that was wrong and we feel like he –

MR. SLAUGHTER: Well, it's related to the identification of the occupational tax revenue which is still something that may be in issue in this case. And it's for that reason that we offer it as well as a supplement to the declaration.

MR. BAXLEY: I withdraw the objection.

BY THE COURT: All right. You may answer.

A. It shows the various types of employers such as utilities, banks, railroads, insurance companies, doctors offices, and other categories listed to pay the occupational tax.

Q. In other words, their employees pay the occupational tax.

A. Yes, the employees of those companies.

Q. Okay. As the tax collector – let's assume the law [421] firm like Mr. Baxley's law firm and my law firm, we have lawyers employed there and we have non-lawyers employed there. Is it your understanding that the non-lawyers pay the occupational tax?

A. Correct.

Q. The lawyers do not pay the occupational tax.

A. Correct.

Q. And what is the reason they do not pay the occupational tax?

A. The attorneys in most cases are required to have a state license under Title 40 Chapter 12.

Q. If you look at this schedule, you will see that the various reports submitted by these companies for that year would show a total amount of gross wages. And then they will withhold the occupational tax on part of those wages and, for some companies, not all, it's not the full amount. In other words, if you turn to the first page of your exhibit, the very

first entity there is Alabama Power. Now, is that your understanding that the county does not have the power, under state law, to tax levy a business license tax on a utility.

[422] such as Alabama Power?

A. I'm sorry. I missed your question.

Q. Does the county levy, under its business license code or any – in any way that you know of or that you're responsible for collecting, a privilege or license tax on a utility company such as Alabama Power?

A. Not on the company itself.

Q. Okay. So you do not tax the company itself.

A. No.

Q. But you do tax the employees as is shown by this schedule?

A. Yes.

Q. The difference between gross wages and wages subject to the occupational tax shown on this is the result of exemptions that result from individuals paying license taxes to the state?

A. Under the far right column it's coded "A" which means that the difference between the gross wages and the wages subject to the occupational tax were determined to be professional license and out of county work.

[423] Q. So there are two reasons why it's less than 100 percent?

A. Yes.

Q. They run the payroll here but they've got people working in Shelby County and other places.

A. Right.

Q. And then another reason is the exemption of the professionals.

A. Correct.

Q. But except for exemptions of that identifiable nature, there is no blanket exemption of the employees of those companies?

A. No.

MR. SLAUGHTER: We would like to offer this as Exhibit 7.

BY THE COURT: Do you object?

MR. BAXLEY: No, sir.

BY THE COURT: It's admitted.

Q. Mr. Godeke, what is the document I just handed you?

A. This is an up-to-date version of the 1996 calendar year ending of the same report showing the various categories and companies with number of employees, [424] gross wages, taxable wages and percent taxable.

Q. So it's a 1996 version of the schedule we just discussed showing the same taxation?

A. Yes.

MR. SLAUGHTER: We would like to introduce this as Exhibit 8.

BY THE COURT: Any objection to 8?

MR. BAXLEY: No.

BY THE COURT: It's admitted. Any other questions?

Q. Could you describe the document I just handed you?

A. Yes, this is a report prepared at my request by Tom Meacham a senior officer in my department that is a statistical reports on total progress and attached is a listing of the various license sections under Title 40 and the license schedule under the county ordinance of the various sole proprietors whose records are maintained through my office.

Q. If we go down the first column of this exhibit, under license description, where is says license section, I take it those license section numbers [425] correspond to the state license code?

A. Yes, Title 40 Chapter 12.

Q. In other words, that refers to or describes the state business licenses that you've levied for the state and/or the county?

A. That's correct.

Q. Could you describe for me the significance of the asterisk on each of these license sections?

A. Those are categories within that section that to paraphrase or quote exactly it says no official license shall be bid through the county. You could see by the third column where it says county amounts. The amount of those licenses are zeroes.

BY THE COURT: Excuse me just a minute. You're welcome to be in Court but let's keep our conversations on the

outside please. The back corner – let's carry our conversation outside. If you want to talk, you're welcome to out there. Thank you. Go ahead.

Q. For these asterisked professionals you, as the county license director of revenue, you collect [426] these monies for the state?

A. Yes.

Q. But you keep nothing for the county because nothing is allocated to the county under those license sections.

A. That's correct.

Q. Turning to page 4 of this report, begin looking at the first column. All of those license taxes there they're county licenses?

A. Yes.

Q. How are they levied? Pursuant to what authority?

A. Act 406.

Q. When you say Act 406, pursuant to the business license code ordinance or the occupational tax?

A. The business license.

Q. Do you – how do you handle the state license taxes on attorneys?

A. We do not collect any proceeds from attorneys any longer as of I'd say three or four years ago.

Q. Is that the only professional license tax that goes to the state for which the collection responsibility has been moved?

[427] A. That I'm aware of, yes.

Q. How do you determine that these licenses were issued to sole proprietors?

A. The individual or the company, as far as that goes, must file an application for a license through our department. On the application they must designate whether they are sole proprietors, corporations, partnerships, LTD. So they would self declare what category that they're applying for a license under.

Q. Do any of the licenses that are described here by various categories, single store license for which, for example, there are 2724. That means 2724 people that are operating some kind of retail establishment as a sole proprietorship?

A. Yes.

Q. Would such a person pay any kind of – in any amount under the county's occupational tax here at issue?

A. No occupational tax.

Q. So this is the list by category of people who are not taxed under the occupational tax because [428] they're self employed and they are obtaining a business license tax as an individual?

A. That's correct.

MR. SLAUGHTER: We would like to introduce this, Your Honor, as Exhibit 9.

BY THE COURT: Any objections?

MR. BAXLEY: No.

BY THE COURT: It's admitted.

Q. Mr. Godeke, what is the document I've just given you?

A. The document that you've given me is a document prepared in our department showing the occupational tax collected by fiscal years ending on September 30 each year since the inception in 1988.

Q. It has a schedule at the bottom by years?

A. Yes, it actually shows the dollar amount and at the bottom by year and then it shows a total collected since 1988.

Q. So this is the documentation of a cumulative amount collected under this tax?

A. That's correct.

MR. SLAUGHTER: We would like to introduce [429] this, Your Honor, as Exhibit 11 – I mean Exhibit 10, I'm sorry.

BY THE COURT: Any objections?

MR. BAXLEY: No, sir.

BY THE COURT: It's admitted.

Q. Mr. Godeke, what is the document I've just handed you?

A. This is another internal report prepared by staff members showing variations of the amount of participants of the occupational tax by years with some assumptions made on various relations I guess you would say. Well, at maturation I might want to know how many active participants we've had on the occupational tax since 1988.

Q. Why can't you just count them?

A. Under the mechanics of what we have, every company is supposed to report an annual reconciliation back to us in the month of January. It is a very cumbersome task, various non-compliance as far as when they remit the reconciliations. It would just be monumental. We would have to do an audit or follow up to each individual one to determine the [430] number of participants.

Q. How do you handle those taxpayers who are not subject to a state or county business license and who, therefore, as individuals pay the occupational tax without it being withheld by the company?

A. (no response)

Q. Do you have a separate account for them?

A. Yes, they have an individual account with us.

Q. So you could count those?

A. Yes.

Q. You have a record of that?

A. Yes.

Q. The problem in tallying, if I understand you, comes from all of the payers of the occupational tax for which the large companies and small companies withhold?

A. Correct. Then the reconciliation includes all the employees for that particular area during any one year and I think the numbers, if they report them on the reconciliation, includes the total employment for that year – maybe not the [431] active participants as of December 31.

Q. Why is this a – what is the rationality of these assumptions in estimating how many taxpayers we had since the inception of this tax?

A. This was the base established in an attempt to determine how many total participants we had in case we would have to contact them individually.

Q. If you did have to contact them individually, is there any, way, that you could have gotten the names and address of each?

A. Yes. Again, the annual reconciliations report in various formats. A lot of them send in copies of the W-2s, some of them send in computer-generated reports with names and addresses.

Q. But you don't keep a running tally of all these taxpayers because most of it is collected by withholding?

A. That's correct.

Q. But if compelled to do so, you could go back –

A. Expand our computer system to maintain individual employees, yes, sir.

MR. SLAUGHTER: Your Honor, we'd like to [432] admit this as Exhibit 11.

MR. BAXLEY: Well, on that one I just don't see the relevancy, Judge. We would object.

MR. SLAUGHTER: Your Honor, it may be relevant to you in trying to fashion a remedy in this case because it basically gives some basis for the debate which has been going on as to how many people may actually constitute the universe

of people we're going to be trying to satisfy in some way or another.

MR. BAXLEY: Your Honor, if it would help fashion a remedy, we withdraw our objection, I guess.

BY THE COURT: It's admitted.

Q. Mr. Godeke, could you describe the document I've just given you?

A. Yes, it's another internal report prepared at my direction to determine the – well, it's really similar to the earlier report showing the license sections that are not required to pay the [433] occupational tax under the Title 40, showing the number issued, the state amount, county amount, total licenses. Then we went in and added an average hourly wage to determine what potential amount the occupational tax would be if those exemptions were not in place.

Q. Why, did you – where did you get these hourly wage figures?

A. From the State Department of Industrial Relations.

Q. Is that your understanding – or it is your understanding that that's the same source of wage data that was earlier admitted in this case?

A. Yes.

Q. So it appears that your department and Plaintiffs' counsel are using the same source for wage data?

A. Yes.

Q. You said an earlier report. What earlier report?

A. I forget what exhibit number it was –

Q. Well, why was that earlier – there's been no earlier report.

A. Of the exhibits.

Q. Oh, okay. I was wondering if there had been an [434] earlier attempt on the part of your department to determine how much was lost to these professionals.

A. I think there was a calculation done back in '94. This is a figure through 1996.

Q. I notice on the back page, page 2 of this, that attorneys are a separate line item. Why is that?

A. Once again, we do not collect any license fees through our office for attorneys so we have to get in touch with the State Bar Association to determine the number of attorneys in Jefferson County.

Q. So the grand total on page 2, what does that represent?

A. The grand total in the far right hand column of $4,777,000 represents an extension of the hourly wage by the number of various licenses issued for that category times the amount of the occupational tax of 1/2 of 1 percent that would be levied.

Q. And based on wage data supplied by the State Industrial Relations Department, this is your best estimate of what additional revenues could [435] be raised by Jefferson County if all of these exempt professionals were subjected to the occupational tax?

A. Yes, sir.

MR. SLAUGHTER: Your Honor, we would like to admit this as Exhibit 12.

BY THE COURT: Any objections?

MR. BAXLEY: None.

BY THE COURT: It's admitted.

MR. SLAUGHTER: I have no further questions.

BY THE COURT: Any further cross examination?

EXAMINATION BY MR. BAXLEY:

Q. Would you gather up these exhibits that he's asked you about and let me just ask you a few questions about them to help me? What number is this one, Defendants' 9?

A. Uh, yes, sir.

Q. Is that one, according to your calculations, show that there are only 209 barbers in Jefferson County?

A. Sole proprietor barbers, yes, sir.

Q. Okay. Now, the barbers then that work for like [436] Fantastic Sam's and these other chains, they would be paying the occupational tax. Is that right?

A. Yes.

Q. Okay. Well, then, tell me what is the rational distinction – no, no, let me strike that – the question that they kept asking on cross are barbers that cut hair in Jefferson County as sole proprietors, stand on their feet the same number of hours per week, treated the same as far as the occupational tax goes, as barbers that cut hair for Fantastic Sam's and stand on their feet and cut hair for the same number of hours?

A. The only difference to me is they are required to have a license because they are sole practitioners.

Q. Okay. So the answer, then, is they are not treated the same as far as the county occupational tax is concerned, are they?

A. One is required a business license, the other one is required to pay the occupational tax.

Q. So one pays the occupational tax and the other [437] one doesn't.

A. In your example, yes.

Q. Okay. Let's take beauticians. The same answer there?

A. Yes.

Q. Okay. Tell me where you got this number where it says on the last page – no, it's not the last page – it's page 3. You've got five stockbrokers.

A. Page 3?

Q. Page 3.

A. Okay. Section number?

Q. 162.

A. Okay.

Q. What does that mean where you say five stockbrokers?

A. Evidently there are five sole proprietor stockbrokers in Jefferson County with a license as a sole practitioner.

Q. Okay. So, then, under your system five of them would be exempted from paying?

A. Yes.

Q. Okay. How many – what about a stockbroker that [438] works for Merrill Lynch or Payne Webber or Sterne A.G., Robinson Humphrey?

A. They would not be sole practitioners so they would be subject to the occupational tax.

Q. So they would pay the occupational tax.

A. Yes.

Q. Okay. So a stockbroker – stockbrokers move about, don't they?

A. I imagine so, yes, sir.

Q. So a stockbroker that works for Merrill Lynch say, would pay an occupational tax and a stockbroker that works for one of these five stock firms as sole proprietorships would not pay it?

A. No, no, that's not the case.

Q. Okay. What is the case?

A. If they work for one of these five businesses, they would be subject to it.

Q. They would be subject to it?

A. Right.

Q. But the man who owns them would not be subject to it?

[439] A. Right. He is the sole practitioner.

Q. Okay. Well, then, when it says court reporters 33. What does that number include? Does that include visiting court reporters that come over for two days?

A. That would indicate there are 33, again, sole practitioners licensed through our department.

Q. Who do not pay it now?

A. That are required to have a license, business license, as opposed to the occupational tax.

Q. So if they pay a business license, they do not have to pay the occupational tax?

A. Correct.

Q. What if they work here in the Jefferson County Courthouse? Do they pay it?

A. Yes, wages earned in Jefferson County.

Q. Okay. What if they work in the Federal Courthouse? Do they pay it?

A. Wages earned in Jefferson County.

Q. Okay. What if they are an employee of one of the large private court reporting firms like Foshee and Turner or those like that? Would they pay it [440] if they're an employee of one of those private firms?

A. If their wages were earned in Jefferson County, yes.

Q. They would pay it. But if they owned a court reporting firm and worked the same number of hours and did the same number of work per week, took the same number of depositions, but they work for a firm they own, they would not pay the tax?

A. They would be required to have a business license and not pay the occupational tax.

Q. How much would their – how much is their business license?

A. Uh, I'd have to look in the county code.

Q. Look at Exhibit #7, if you could. 7 is the little red one. For instance, what does a court reporter that does not have to pay the occupational tax pay?

A. It depends on the various scale, less than 5000 it would be $15. Then it goes into a formula and calculation depending con the amount generated.

[441] Q. Okay. What if they generate in billing $50,000 a year?

A. $75 plus 1/2 of 1 percent in excess of $30,000 so that would be 1/10 of 1 percent of –

Q. $20,000?

A. $20,000.

Q. Plus $75?

A. Plus $75, yes.

Q. So that would be, what, 1/10 of – 1 percent of $20,000 – or 1/10 of 1 percent is what?

A. I don't have a calculator or anything to scribble on.

Q. Wouldn't it be $20?

A. $20 I believe.

Q. So, a court reporter's license might be $95.

A. Correct.

Q. But if they work for the federal government they'd pay a half of a percent of their salary?

A. For those wages earned in Jefferson County.

Q. Okay. What if they earned all their wages in the Jefferson County Courthouse or the Federal Courthouse?

[442] A. They would all be subject to the ½ of 1 percent.

Q. Okay. And if their billings were in Jefferson County, that would be – and it's $6,000 worth of billings, they'd pay $95?

A. If they were required to have a license under Section 27.

Q. Where do you get the number of real estate agents from in these exhibits?

A. Based On the applications of the individuals filed with us that are claiming to be sole proprietors.

Q. Okay. Page 5 of this exhibit shows 1575 real estate agents?

A. Yes.

Q. Now, that would be that are sole proprietors?

A. Yes.

Q. Okay. What about the agents that work for Johnson, West, Page and Ray and Company and Good Housekeeping real estate agencies? They would not be in there?

A. Probably would not be in here because the selection criteria was sole proprietorship.

Q. Okay. Now, the real estate agents – this is a [443] projection here of what would come in if they had to pay it. Is that right? By, this I mean Exhibit #7 – Defendants' 9, I'm sorry.

A. Yes.

Q. One of your figures shows there are 3629 attorneys in Jefferson County?

A. That's correct, based on the number furnished by the State Bar Association.

Q. And they don't pay anything in the way of the occupational tax?

A. No.

Q. Do you think those attorneys and their families have any use for the Sheriff's Department services in Jefferson County to the same extent as a barber that pays the tax or a court reporter that pays the tax?

A. I would imagine they would demand that, yes.

Q. Do you think they would have any less use for the civic center or the roads of Jefferson County or any other service of Jefferson County than a person that's a member of a union that works at a salaried job?

[444] A. I wouldn't think so, no.

Q. Okay. How many doctors do your records show there are in Jefferson County?

A. Under Section 126, Title 40, we show 1867.

Q. So, according to your records, there's only a third the number of doctors that there are lawyers in Jefferson County?

A. 1800 compared to what 3600?

Q. How many did you say? How many doctors did you say?

A. 1867.

Q. I'm sorry. I thought you said 1200, I'm sorry. You said 1800?

A. Yes.

Q. You say there are only half the number of doctors in Jefferson County as there are lawyers?

A. That's what this report indicates, yes.

Q. Okay. What about dentists? How many dentists does it show in Jefferson County?

A. 281 dentists under Section 92.

Q. All right. Under every section that's conceivably there, how many dentists are there in Jefferson County?

[445] A. I don't understand that.

Q. How many dentists, according to your records, are in Jefferson County?

A. 281.

Q. 281. And you think that there are only 281 dentists in this county of several hundred thousand?

A. That's what this report would indicate, yes.

Q. What about the number of nurses that are in this county? Do you know how many nurses are in this county?

A. Yes, sir. You have a selection of criteria based on sole proprietors.

Q. Okay. What about pharmacists? How many pharmacists are in Jefferson County?

A. Under County Ordinance Section 34 there is one sole proprietor for Jefferson County.

Q. So, according to the county's records, there's one pharmacist, sole proprietorship, in Jefferson County.

A. Well, according to this, there's one license issued under prescription shop as a sole proprietor, yes.

Q. Okay. Is that what you're basing your testimony [446] about the money that's come in on, those type figures?

A. Those figures have been extended in the subsequent columns.

Q. What about the pharmacists that work for Harco or Eckerds or Revco?

A. They would not be on here because they're currently paying the occupational tax.

Q. They are?

A. Yes, sir.

Q. Okay. Now how many of them are paying the tax?

A. I have no way to determine that figure from these reports.

Q. Does anybody in the county have any records on which they can determine how many pharmacists are paying the occupational tax?

A. Unless they would be a regulatory agency to keep up with that, I would not have any way of determining that.

Q. Is there agency of the county that you know of that is able to determine how many are paying it?

A. Individuals, now, if you're asking how many of those [447] individuals submitting those records to an agency are pharmacists, those reports do not indicate their titles.

Q. Is there any way, if the lawyers decide, or the Court or the Supreme Court of Alabama or the Supreme Court of the United States wanted to find out how many pharmacists in Jefferson County pay the occupational tax, is there any way on God's green Earth they can find out?

A. Sure.

Q. How?

A. You would have to do an audit of all the various accounts that are paying the occupational tax. Go to them one on one, solicit them with some type of questionnaire or an audit, to determine the number of employees reporting on the annual reconciliation how many of those were pharmacists.

Q. So you'd have to do an interview one-on-one, according to your testimony, with some 425,000 people?

A. No, sir.

Q. Okay. How many?

[448] A. We've got 18,000 active accounts who pay – such as Jefferson County. Jefferson County pays me one check every month for the occupational tax. So behind that, that represents payment for roughly 4000 employees. So we would contact, in this scenario here, we would contact Jefferson County paymaster to tell us how many pharmacists were in that group of 4000.

Q. All right. How would Jefferson County know how many pharmacists were in their group that they submit?

A. I'm sure they have pay records which also include titles or positions that tie them in with human resources or the personnel department.

Q. Wouldn't it be a lot simpler on the administration of the tax and on you if just everybody that worked in Jefferson County paid a half of a percent or a quarter of a percent on what they made in Jefferson County?

A. It's very simple to me now. Either they're required a license under the state or county ordinance or they're required to pay the occupational tax.

[449] Q. All right. So you think it's simple now?

A. For the majority of it, yes.

Q. All right. Let's talk about preachers. Preachers at my church, Vestavia Hills United Methodist Church, are they subject to the tax?

A. I don't know for a fact this particular situation but he would not be subject to it. I don't know that for a fact.

Q. All right. What about at my wife's church which is St. Peter's Catholic Church? Do you know whether the priest there would pay or not?

A. I don't know precisely if they are paying it but they are not subject to it.

Q. They would not be subject to it? Why would either of those not be subject to it?

A. Assuming again they're ordained ministers and priests under advice of the county attorney we do not exercise that.

Q. All right. What if you're a – you know, we have a pretty large population at the medical center at UAB of people from the country of India who work there, don't we?

[450] A. I would imagine so, yes.

Q. Do you think that some of those people from India that work in the medical center may be Hindu?

A. I would have no idea.

Q. Do you know whether they have a church of that denomination or whatever you'd call an equivalent of a church in the Hindu faith?

A. Personally I do not know.

Q. Do you know whether we have any Buddists temples in Birmingham?

A. Personally I do not know, no.

Q. I notice on here in Homewood there's a Shrine going up to Ruth Crisps Steakhouse directly to a Moslem temple. Do you know whether we have any Moslem temple in Jefferson County?

A. I've seen that shrine and I don't know whether we have any temples in Jefferson County. I would probably think so somewhere in Jefferson County.

Q. Do you know whether the equivalent of a minister at any of those faiths that I've mentioned would be subject to the occupational tax?

A. I'm not that familiar with all the religions. [451] It would take a review of the situation to make that determination.

Q. And some you think – how would you make a determination if they would or would not?

A. If their religion recognizes that as an equivalent of an ordained minister in the Methodist church,, you know, after we reviewed the situations, we would probably take that into consideration.

Q. So you would apply it to what the standard is in Christianity whether they are ordained ministers?

A. Generally, but there is probably some other, you know, dialog included with the individuals.

Q. All right. Let's go – the Quakers or Society of Friends. Do you know whether they ordain ministers?

A. No, sir.

Q. Do you know whether the Mormons ordain ministers?

A. No, sir.

Q. Do you know whether any – what about the employees of these various churches? The sexton or the organist or the minister of music or choir director or the missionaries? Do you know whether they pay [452] occupational taxes?

A. The choir director, staff personnel would be subject to the occupational tax.

Q. Do you know whether they actually pay it?

A. I believe I've seen some documentation that indicates yes.

Q. Okay. Then, how is the distinction made that the minister does not pay but the minister of music does?

A. That was in place prior to 1991 and I understand that was through the advice of the county attorney.

Q. Is it true that the county, a couple of years ago, agreed to keep all records of taxpayers, names, addresses, and amounts paid, and not allow them to be discarded in the event a refund was ordered?

A. Yes, sir.

Q. And so they're in storage somewhere?

A. Various places, yes, sir.

MR. BAXLEY: That's all, Your Honor.

BY THE COURT: Anything else?

MR. SLAUGHTER: Yes, sir, Your Honor.

EXAMINATION BY MR. SLAUGHTER:

[453] Q. Mr. Godeke, I would like to read to you the first sentence of Section 1249 which deals with the state privilege taxation of attorneys. Each attorney engaged in the practice of law shall pay an annual license tax to the state but none to the county. Let's take an individual like Mr. Paul Jones who is the chairman of the board of Compass Bank and who used to practice law and I understand maintains his licensure to the state bar. But, to my knowledge, he runs Compass Bank. He does not practice law. Does he pay the occupational tax?

A. Yes, he does, in his current position.

Q. Could the fact that attorneys often perform jobs that business people, as executives and other functions other than practicing law, account for the large number of licensed attorneys who are listed in your schedule or who really don't practice law?

A. Yes, that's a possibility.

Q. With regard to this individual proprietorship. How do you define an individual proprietorship?

A. Once again, it's based on the application submitted [454] to us by the individual on the application process.

Q. What does that application show? Individual, corporation, partnership –

A. It has seven or eight different categories and one of them is a partnership, one is a sole proprietor, one is a corporation.

Q. Is a sole proprietorship classification then an individual who, if he owns a barber shop or a real estate company or whatever, he owns it as an individual. He does not own it as a corporation?

A. Yes.

Q. So a sole proprietorship, in your view, does not include a corporation who has as its sole employee the sole owner of the corporation?

A. No, sir.

MR. SLAUGHTER: Thank you.

BY THE COURT: May he step down?

MR. BAXLEY: No, sir. I have something more.

EXAMINATION BY MR. BAXLEY:

Q. I'm not going to go through each one of these categories, but, I notice in some of your documents there that as of now embalmers were paying the [455] occupational tax. Is that correct?

A. Which document are you referring to?

Q. One of them that shows that there are 36 of them. In this thing you filed with the Supreme Court, what number is that?

A. 7.

Q. 7? Is it true that 36 embalmers right now pay the occupational tax?

A. What page? The first category, the type of business which employes embalmers. Underneath that is listed an individual company which doesn't necessarily say all 36 are embalmers or any of those are embalmers. I think Johns Rideout has individuals participating in the occupational tax.

Q. All right. According to your exhibit #7, under categories of embalmers, everybody at Johns Rideout was paying tax.

A. Those 36 individuals.

Q. Okay. Now, that shows – as far as that shows, 100 percent of the people at Johns Rideout pay the tax?

[456] A. Right.

Q. Okay. Now, under what parts are you making these people that are embalmers pay the tax? I'm switching 180

degrees. Under what authority are you – is the county collecting money from them? Aren't they included in the old Title 51 where they pay a state license fee of $10?

A. Embalmers would be support personnel such as clerks, payroll type of administrative personnel.

Q. But they're listed on your Exhibit 7 as embalmers, aren't they?

A. That's a category that we use to distinguish between utilities as opposed to the other categories that would list other companies under.

Q. Well, if any embalmers are paying the tax and also are licensed, would you agree that they're not supposed to be paying it?

A. If they have a license under embalmers 40-12-98, and are paying the occupational tax, we would return a refund, yes.

Q. Would you let the county attorney advise you on whether to give back to them or not?

[457] A. Yes.

Q. Okay. I notice on that same list there that you've got at AmSouth, in the banks, 100 percent of the people there are paying the occupational tax on that exhibit, aren't they?

A. Yes.

Q. All right. Doesn't AmSouth have attorneys up there, Corporate attorneys, in-house attorneys? Mr. Slaughter asked you about Mr. Jones at the Compass Bank.

A. I would think so, yes.

Q. But in addition Mr. Jones is the CEO of Compass Bank but AmSouth has attorneys that work full time for AmSouth and in the trust department, don't they?

A. Yes, I would think so.

Q. Okay. And yet according to that figure everybody that works for AmSouth pays the tax.

A. 2416 employees that they reported on the annual reconciliation pay the occupational tax.

Q. What is the difference between what the attorneys – corporate attorneys at AmSouth do and the corporate attorneys at Liberty National?

[458] A. I'm not that familiar with the structure of each company.

MR. BAXLEY: I think that's all.

BY THE COURT: May he be excused?

MR. SLAUGHTER: Just one question.

EXAMINATION BY MR. SLAUGHTER:

Q. Mr. Godeke, is the term embalmer interpreted under your license tax to include a place of business as well as an individual embalmer?

A. It could be, yes.

So, Johns Rideout could be an embalmer and people working for it could also be embalmers?

A. Yes.

Q. If you had an employment, a company, – whether it be a real estate company or a funeral home that had worked out

an arrangement which wasn't a genuine legal arrangement where people who provided services on premises, like embalmers, were individual contractors, then would that individual contractor have to get an embalmers license?

A. He'd be required to get an individual license.

[459] Q. And if he as such individual contractor had had that license, would he be exempt from the occupational tax?

A. If the position required him to obtain the license under category 98, then he would be exempt from the occupational tax.

MR. SLAUGHTER: No further questions.

BY THE COURT: May he step down?

MR. SLAUGHTER: Yes.

BY THE COURT: Let's take a five minute recess and complete the case.

* * *

[551] EDWIN STRICKLAND

(THE WITNESS, AFTER BEING DULY SWORN TO TELL THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, TOOK THE STAND AND TESTIFIED AS FOLLOWS):

EXAMINATION BY MR. SLAUGHTER:

Q. Would you state your name, please?

A. Edwin A. Strickland.

[552] Q. Mr. Strickland, what is your employment?

A. County attorney for Jefferson County, Alabama.

Q. How long have you been the county attorney for Jefferson County as a government employee?

A. I'm here representing the county in 1967 as an assistant county attorney. I became the county attorney in 1975.

Q. Are you chief legal officer for the county and does the County Commission rely upon you for legal advice in preparation of their ordinances and in their implementation of these ordinances?

A. It does.

Q. Mr. Strickland, would you identify the document that I've given you?

A. This is a picture of a portion of the Code of Alabama. I think this is from 1958 published version Title 62, Section 155, page 422.

Q. What is the purpose of this Code provision and, as a part of the same question, does it apply to Jefferson County?

A. It does. This is part of the compilation of local laws applicable to Jefferson County. And

[553] this Section 155 relates to the county attorney and provides the authority for the County Commission to have a county attorney to carry out the legal functions of the county. It also provides authority to the county attorney to serve as for – in the same function as an attorney general. As far as county matters are concerned, it allows the public officials to rely upon the opinions of the county attorney.

Q. To your knowledge, this law is still in full force and effect?

A. It is.

Q. And do you interpret it so as to include, among all the county officials, not only the County Commissioners but Mr. Godeke, the Revenue Commissioner to implement the county occupational tax?

A. It would include Mr. Godeke.

MR. SLAUGHTER: Your Honor, we would like to offer this document, the statute, as Exhibit #2.

MR. BAXLEY: No objections.

[554] BY THE COURT: It's admitted.

Q. In this handling of this case, there have been a great number of copies of Act 406 offered in evidence and I chose not to do so, so I'd like to avail myself of the earlier Plaintiffs' admitted, which I believe is #4 –

A. I have a copy.

Q. If you have a copy, then we don't need to look for it.

A. Okay.

Q. You have Act 406 before you?

A. I do.

Q. Mr. Strickland, on the basis on your long service as the county attorney, could you explain to me the purposes for which a county can levy license taxes in this state?

A. Well, there's basically two functions, I think. One would be to produce revenue and the other would be to provide some form of regulation in line with county's police powers.

Q. You are familiar with Act 406, which you have a copy of?

[555] A. Correct.

Q. You have read that and you have used it, I assume, as a basis for the occupational tax which is the issue in this case.

A. Correct.

Q. Based on your reading of Act 406, what is its purpose? Does it have the purpose of raising revenue, the purpose of regulating occupations in Jefferson County, or some combination of both?

A. I think its purpose is to raise revenues.

Q. That's purely its function in your evaluation?

A. It is.

Q. Looking at the Act and its language, does it compel Jefferson County to levy license taxes or occupational taxes or does it confer upon the county a grant of authority to do that?

A. Act 406 is a delegation by the Legislature of a grant to endorse the function of government to produce this revenue for its purposes.

Q. Were – when the County Commission decided to levy this tax in 1987, did they designate you as the craftsman of the ordinance?

[556] A. I was.

Q. So you had occasion at that time to advise them of the proper interpretations of Act 406 and the taxing authority conveyed there under?

A. That's correct.

Q. And, at that time, did you conclude that the county had some discretion as to the dimensions of the occupational tax that would be levied?

A. Yes. As a grant or delegation of this authority, it would be up to the County Commission to decide how much of it to use.

Q. And did the County Commission in 1987 adopt Ordinance 1120 for the sole purpose of raising revenues?

A. That's correct.

Q. I have two documents here. One is a certified copy of the county business license ordinance and the other is a certified copy of the occupational tax ordinance.

MR. SLAUGHTER: And since both of these are involved in this case, Your Honor, we would like to admit both of them into [557] evidence as Exhibits 3 for the business license code – that one right there – and Exhibit 4 for the occupational tax.

MR. BAXLEY: Your Honor, we have no objection but they are in evidence.

MR. SLAUGHTER: Well –

MR. BAXLEY: They're our Exhibits 7 and I think 2.

MR. SLAUGHTER: There is some redundency but if it can preserve the continuity of our numbering scheme, Your Honor, we numbered them before we knew what their exhibits would be.

BY THE COURT: All right. They're admitted.

Q. Now, Mr. Strickland, I'd like to ask you some questions about how the occupational tax works, in your opinion, because as I understand your previous testimony you were the principal advisor to the County Commission in creating this ordinance and you were the principal legislative draftsman of it. What kind of legal entity does – does [558] Ordinance 1120 purport to tax?

A. 1120 is the occupational tax. It purports to tax the employee of an employee-employer relationship who would be a actual person.

Q. Your answer is identified as two elements, or do I understand you correctly?

A. Yes.

Q. It taxes an actual person.

A. Right.

Q. And it taxes an actual person that is an employee-employer relationship, as I understand it.

A. Right. Correct.

Q. I would direct your attention to Section 1(b) and the language there which I will read to you. The rendering of any kind of personal services or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer that's defined in this section. And then we skip the definition of employment. I don't think for the purposes of this [559] question it's necessary to read that. But that language, is

that intended to be all inclusive, except for the enumerated exceptions? How do you interpret that language? Is it all inclusive? Does it include governmental employees? Does it include all civilian employees? Was that your intent?

A. Yes. It's the intent to place the occupational tax on this class of individuals who were not previously taxed by one of the other taxing agencies which would include everybody within that class, every natural person within that class, except for one expressed exception.

Q. Could you tell me what the ordinance excludes according to your interpretation?

A. The ordinance excluded domestic servants employed in private homes and then it references the limitation of the authority granted by Act 406 so that the purpose of the tax is to tax all natural persons in an employment relationship that the County Commission was authorized by the law to tax with the exception of domestic [560] employees in private homes. And I will say a caveat to that, there's a further limitation by Act 406 as to what is done by the larger cities within the county. So, I should say that that's a further limitation.

Q. Do you know what the occupational tax of the largest city was at the time?

A. That would be Birmingham's occupational tax.

Q. All right. And it was what? Do you know?

A. Pardon?

Q. What was that? What was that tax or what is that tax at the present level?

A. Its rate?

Q. Yes.

A. It's one percent of gross compensation.

Q. So, levying the county occupational tax of one half of one percent was comfortably under that limitation?

A. It was but also keep in mind that the limitations were also extended to who was eligible to be taxed. Anyway, the domestic workers were exempted from the city occupational tax and so, therefore, we [561] wanted to take that authority to tax the most appropriate people.

Q. If I may direct your attention to Section 1(b) again, if I recall your earlier description of the exemptions and included domestic servants and they included the taxes described by the Code provisions which put a limitation on the county's authority in 406. But also, if I read this correctly, there's another exemption there and that is any natural person who paid a tax under the general license code of the county.

A. Correct.

Q. So that's a third exemption. Is that correct?

A. Well, yes, it would be, in that sense. The county, under a previous ordinance which was put into evidence as Exhibit 3, had already utilized a substantial portion of the authority provided by Act 406 in the establishment of the business license code. So, a number of businesses were already being taxed by the county. Since the adoption of the – I think this was originally set out as Ordinance #1 of Jefferson County in [562] about 1968.

Q. Now, you have testified that for all of the provisions of Act 406, that linked the occupational tax with the occupational tax in the City of Birmingham, you had to be mindful of

the taxes levied under that occupational tax. You couldn't go outside the boundaries, if you will, of the Birmingham ordinance, as I understand your testimony.

A. That's right.

Q. So, you had, for that reason among others, occasion to consult the Birmingham Occupational Tax Ordinance and its coordination with the Birmingham Business License Ordinance?

A. Yes.

MR. SLAUGHTER: Your Honor, we would like to admit into evidence those two ordinances for the City of Birmingham –

MR. BAXLEY: Your Honor, we would object to the relevancy. They simply are not relevant to anything that is in issue here today.

[563] MR. SLAUGHTER: Your Honor, it is extremely relevant. Act 406 coordinates these – they – these two taxes and, further, the city's occupational taxes have been the subject of considerable litigation by the Alabama Supreme Court or by two Alabama Supreme Court cases. One is a Court of Civil Appeals case. Until Jefferson County levied this occupational tax, there were no occupational taxes of this kind, except municipal occupational taxes. So the relevant judicial authority applies to this kind of municipal tax which served as the model for the Jefferson County Occupational Tax. And for that reason we consider these ordinances to be relevant. And the Court might take judicial notice of them but I think for the convenience of this Court, as well as the convenience of any Appellate Court, these would be useful exhibits.

BY THE COURT: They're admitted. Excuse me [564] just a minute. Let me take just a minute. Let's take a five minute recess.

(AFTER THE RECESS, THE FOLLOWING WAS HAD AND DONE):

BY THE COURT: Court's in session. You may continue.

Q. Mr. Strickland, could I direct your attention to page 127-1 of the Birmingham Occupational Tax which is Exhibit 5?

A. Page number again?

Q. 127-1. It's right at the beginning.

A. All right.

Q. At the bottom of the page you will see language "but they shall not mean or include domestic servants employed in private homes or business, etc., or for which license fees – or let me start over again. Strike that. But they shall not mean or include domestic servants employed in private homes or businesses, professions or occupations for which license fees are required to be paid under any general license code of the city. Is not the occupational tax language of the county identical to that language except you don't [565] have the statutory exemptions of Act 406?

A. I believe that it's identical to that point of the sentence.

Q. Right. The only exception other than the fact you're dealing with the City of Birmingham rather than Jefferson County, is the absence of the exemptions mandated by Act 406.

A. That's right and in the county ordinance, the sentence goes on to reference those other limitations of Act 406.

Q. All right. Turning to these exemptions that were mandated by Act 406, when you were drafting the ordinance and consulting the County Commission about the extent of your taxing authority, you had occasion to look at each and what are the Code provisions of Act 406 – I mean Code provisions that were referenced in 406 as a limitation on county taxing authority.

A. Yes.

Q. And can you tell me what categories of exemptions that you noted there?

A. Well, the categories would be the – well, the [566] biggest category initially would be the businesses – we don't use that term in the universal sense – that are included in the state business license code, would be the first category. And then I believe a couple of these other citations deal with the different forms of utilities that are in operation in the state and in the county, which could include telegraph companies, any forms of communication, public utilities, power, water, and then the –

Q. Would you characterize them as sort of big business taxes as opposed to being a professional?

A. It certainly would be big business in my judgment, railroads, those type of utilities.

Q. All right. Returning to the first category, the state business license code that you referred to, are you familiar with that in general terms, for example, does it include lawyers and accountants and professionals of that kind?

A. Yes.

Q. Did – does that state license code permit the counties to piggy back and collect the tax along [567] with the state on those particular professions?

A. No, I think there were a few designated professions in the base of this license code that prohibited the county from piggy backing and I believe it included attorneys and accountants.

Q. All right. You've explained why you excluded domestic workers. Why should you follow the example of the Birmingham Occupational Tax Ordinance and exclude tax on natural persons who already bought a county business license under the county license code?

A. Well, I think that was the thrust of Act 406. and it would not have been the purpose to tax two times the same individual under the business license code and then under the personal – then under the occupational tax. So, the individuals who were already in business in an individual capacity under the business license code, were excluded from the occupational tax and also there would be a question about whether they would be in an employee relationship anyway.

Q. What do you mean by that? In other words, someone [568] who is self employed doesn't employ himself? Is that what you're saying?

A. I think that's the problem. And individual who is self employed is – doesn't really consist of an employer-employee relationship. The occupational tax doesn't seem to breach that.

Q. So, let me see. There are two reasons then, as I understand that you've identified. One is to avoid double taxation.

A. Yes.

Q. And the other was to avoid ambiguity in the definition of employment for purposes of the implementation of the tax.

A. Right.

MR. BAXLEY: Your Honor, I'm going to have to object to leading questions.

BY THE COURT: Sustained.

Q. Did it occur to you that you might, instead of exempting the occupational taxpayers – let me strike that. Did it occur to you that instead of providing an exemption to the occupational tax for people who already pay a county license tax, [569] that you should just rewrite everything and I guess create a new tax which consisted of both the occupational tax and the business license tax?

A. Well, that would have involved a – what to me would have been a monumental undertaking. We had a business license code that had been in place for 20 years and was well familiar to the business community and to the county revenue department. The problem of introducing a new tax of the nature of the occupational tax, was difficult enough in itself without taking on the further problems by starting all over with the license code. So, I don't believe that it would have served the public purpose for us to have done that in conjunction with putting in the wide-reaching occupational tax at the same time.

Q. Excuse me a moment. I need to retrieve an exhibit. Do you have any of the Defendants' exhibits that are all here? This report that we discussed yesterday about the identification

of the proprietorships who paid the license taxes and [570] Mr. Godeke discussed that.

BY THE COURT: Why don't we move to another area while we're looking for the –

MR. SLAUGHTER: No, I know there are other areas but it breaks the logic of my series of questions and I'm – if they can stipulate to the fact that this is Exhibit 9, when we find it.

MR. BAXLEY: If you say so, we'll stipulate it.

MR. SLAUGHTER: Okay. I will provide Mr. Strickland with my copy and try to deal with it from there.

Q. Mr. Strickland, have you seen that report?

A. I think I have. I haven't studied this report.

Q. Prepared by Mr. Godeke which identifies the people – the number of license of individual proprietors who pay either the state tax – license tax which you collect or the people who pay pursuant to the county license code.

A. I believe that's the characterization made by a subordinate of Mr. Godeke on the first page.

[571] Q. Have you discussed this report with Mr. Godeke?

A. Not particularly but I'm generally familiar with it, I think.

Q. Do you understand the logic of it?

A. Well, you can try me.

Q. Okay. Here is Exhibit 9, it seems to have lost the label.

A. This would be businesses in his departments that were issued a county license under the county license code as sole proprietors.

Q. The second part of it deals with the county license code beginning on page 4. The first part begins with the state license code being on page 1.

A. Okay. That's not written on here.

Q. You're correct. It is not. The way you would determine that is by actually looking at the license section numbers and comparing them with the state code and you would compare, beginning on page 4, the various sections of the county license code with the line item entries. And by doing that you can establish the correspondence.

[572] A. All right.

Q. Now, while you're referencing that, I want to see if we can establish an understanding of who is exempt under this occupational tax ordinance. Domestic workers, are they exempt?

A. Yes.

Q. Okay. People – are people who pay an individual license tax to the state exempt?

A. If they're within the business license code of the state.

Q. I specified any of those section reference in 406?

A. Right.

Q. But if they're not specified in those statutory references in 406 and they pay to the state, they are not exempt?

A. Correct.

Q. Are people who are individual proprietors who pay a county license pursuant to the county historic 20-year or more old business license, are those people exempt?

[573] A. Yes.

Q. Okay. Can you think of anyone else who is exempt?

A. (no response)

Q. Who is an actual person.

A. I can't think of anyone at the moment.

Q. All right. To clarify this, what if I am a professional and I practice as a professional corporation, and my professional corporation pays a county business license, and I'm the sole owner of that corporation.

A. Well, the sole proprietor – that's the category you're talking about earlier –

Q. No, as a legal entity. Does sole proprietorship apply only to natural persons?

A. Yes.

Q. Okay. Now I am a professional corporation and I pay a county business license tax.

A. Yes.

Q. And I own the corporation solely. And I pay myself a salary. Do I have to pay an occupational tax on that salary if I am not an otherwise state-exempted profession?

[574] A. Yes, you would.

Q. So for – to understand that, a natural person who is exempt under the county business license code, but who elects to do business – let me strike that. It gets rather complicated. Let us say that I am a natural person who works as a geologist for a real estate appraisers. Let's take two types of professionals who testified yesterday. And at the time they testified, as I recall, they were not subject to a state license tax that was specified in Act 406. They – in one case, the real estate appraiser practiced as a corporation. They conducted their business as a corporation. The corporation paid a county business license tax. Under that situation, would the owner – the 100 percent owner – of that corporation who pays himself a salary also have to pay the occupational tax.

A. He would on his salary.

Q. But if he had chosen to avoid practicing his business as a corporation and had just obtained the business license directly as an individual, [575] he would not have to pay the occupational tax on that earnings, correct?

A. Correct.

Q. Thank you.

A. That's to avoid the double tax.

Q. All right. Changing the subject, and going to a couple of – I'm going to give you this for ease of reference of the state license code. First of all, let's consider the profession of ministers. Is it your interpretation that the county occupational tax applies to ministers?

A. Yes.

Q. He collects his salary from the church.

A. Right. Yes, they're included in the occupational tax.

Q. Do you know whether or not they're also included in the Birmingham Occupational Tax?

MR. BAXLEY: Your Honor, we object. It's immaterial. What Birmingham does or doesn't do is immaterial.

BY THE COURT: Sustained.

Q. Why did you include ministers in the occupational [576] tax? Or not exclude them.

A. Well, I think it would be the intent of the County Commission to exercise the full authority provided by 406 and, at the time that we were drafting and proposing this local taxing authority, we were trying to sweep as broadly as we could.

Q. Did you follow the example that you were consulting that ordinance or the Birmingham Occupational Tax?

A. Well, certainly we didn't want to reinvent the wheel and Birmingham was tied in – we were tied in to Birmingham by Act 406. We had to consult the code in order not to exceed the limitations that Act 406 imposed on us by connecting us with the Birmingham License Code. So we had to reconstruct that code and to then include whatever we had the authority to include and ministers were not excluded by the Birmingham License Code but, as far as I know, they were subject to tax.

Q. Do you think it is Constitutional to include ministers in the occupational tax?

A. My personal opinion?

Q. The opinion that you – the legal opinion that [577] you incorporated into the creation of Ordinance 1120.

A. I did.

Q. Have you enforced the occupational tax against any ministers since it's gone into effect?

A. That's more a function of the revenue department but it is my understanding that the ministers paid the occupational tax for seven years and there are many ministers who are still paying the occupational tax.

Q. Okay. Are there some who have demurred and refused to pay?

A. That's correct.

Q. And has the county instituted enforcement proceedings against them?

A. Your Honor, we looked at this pretty hard and it's a rather unique legal situation. My memory is that there are several United States Supreme Court cases that bear on this point and a number of other state lesser Court cases that bear on point. In fact, we studied this matter several years ago. We pretty much came to the conclusion [578] that we didn't want to undertake to force the issue on ministers at that time. The law was or seemed to be merging and evolving and it's just a battle that we didn't need to undertake at that time.

Q. Could your reasons sort of be classified then as tax administration reasons? You just –

MR. BAXLEY: Object to leading.

BY THE COURT: Sustained.

Q. Would you have – in your opinion, based on the complicated legal uncertainty that you've just described, would this kind of litigation be expensive –

MR. BAXLEY: Object to leading.

BY THE COURT: It is leading, sustained.

Q. Well, can you think of any reason why you wouldn't pursue enforcing the occupational tax against ministers?

A. Several reasons. Any lawyer is going – when he has the opportunity is going to be mindful of the battles that he chooses to undertake when he has something of the magnitude of this [579] task. We – well, the situation with the federal judges is an example. We decided to pursue that because we thought we could win and it just astonished me that that particular matter has gone all the way to the United States Supreme Court. I thought it was pretty straight forward and clear. So you just don't know. The ministers involve a much grayer area than did federal judges. Ministers involve implementation of the First Amendment of the United States Contitution which is always evolving and pretty much my decision I suppose not to pursue that at this time. We haven't ruled it out.

Q. Have you done any calculations about the expense-reward ratio in pursuing such litigation? How much money you would collect in relation to the expense.

A. I have not but just from the general practicalities of it, it would be a very small amount relative to the tax itself.

Q. You referred to your enforcement efforts against federal judges. Are you familiar, then, are you [580] handling the suit against federal judges?

A. I was involved in the initiation of it and had taken a lesser role in the latter but I'm familiar with it generally.

Q. Could you describe that enforcement effort?

A. Well, we've used several judges pretty much the same as we did any other federal employee and some of the biggest problems we had in the early implementation was convincing federal employees that they were subject to the tax. I think a lot of federal employees sort of were guided by this faction that was going on with the federal judges. So we had to fish or cut bait. We were very – felt very confident about our cases on the federal judges and so we pursued collection for those that were refusing to pay. Incidentally there were several of them that were paying it. In my memory there were only two that refused to pay it. In the beginning all of them were paying the city occupational tax. So, that's the kind of rationale that was included in our decision to pursue the federal judges.

[581] Q. Turning to federal employees generally, is the occupation tax – does it apply equally to federal judges and state judges who practice, sit on the bench, in Jefferson County?

A. It does.

Q. With regards to other kinds of governmental employees, does it apply equally? For example, would it apply equally to an employee of the State Department of Human Resources and an employee of the Social Security Administration of the federal government or the department of health and human resources?

A. It does. I don't recall any reason in particular who the employer is, whether it's the federal government or the state government or county government or the city government.

That wasn't really the issue. The issue is what is an employee-employer relationship and whether it's a natural person. That's pretty much the criteria.

Q. What has happened to the case that you brought to enforce the tax against federal judges? You mentioned it was appealled to the United States [582] Supreme Court. What did the United States Supreme Court do with the case?

MR. BAXLEY: We object. It's immaterial and irrelevant.

BY THE COURT: Overruled.

A. My memory is that the Court took the case and then directed the attorney for the United States of America to take a position on the matter and he filed a brief which supported the county's position on the occupational tax against federal judges. And following that the U.S. Supreme Court referred the matter back to the attorneys for – I mean back to the 11th Circuit Court of Appeals and then back to the attorneys for briefing on that point further. And that's where it is now. It's back at the 11th Circuit Court of Appeals.

MR. SLAUGHTER: Your Honor, we would like to admit into evidence a copy of the opinion – of the brief rather filed by the Solicitor General of the United States on behalf of the United States Government at the direction of the Supreme Court of [583] the United States setting forth their analysis of this tax under the Buck Act and the Public Salary Tax Act. There are really two statutes that are involved there and they kind of – one named the Buck Act – but it's for USC-111 is not really part of the Buck Act. The two federal taxes are in issue in this case as a basis for the sub-class claiming that they are exempt as federal employees. And we think it's highly relevant

that the highest agency to express an opinion on this legal question for the United States Government has expressed its opinion to the United States Supreme Court that no federal employee is exempt from the occupational tax under this Buck Act or the other salary taxes.

MR. BAXLEY: Your Honor, we would object on three grounds, irrelevant, immaterial – one and two – and number three, the judges who tracked this thing, did [584] it on a totally separate theory that is not any way, shape or form of fashion related to what we have here. It's just so immaterial. And in addition even though immaterial I might could see letting the opinion of the Supreme Court come in for sort of guidance even though on an immaterial point. But to offer the brief of the brief by any party or any side is just ludicrous as far as stretching the materiality.

MR. SLAUGHTER: Your Honor, this is not a brief this is a brief filed at the request of the United States Supreme Court for direction by the Department of Justice. It was a brief filed pursuant to an order that was entered by the Court and is part of the public records of the proceedings in the United States Supreme Court. Normally these briefs are not filed under those circumstances. Moreover, his [585] characterization of the issues in the judges' case is not correct. One of the issues was that the government had not consented to the taxation of federal judges in this his manner and under this kind of an occupational tax act. And the analysis in this brief examines the nature of the ocupation tax in the context for you at C-111.

MR. BAXLEY: Your Honor, in addition to those grounds as cited, if he really stressed it and the Court were to believe, he might could call whoever he wants to and let them

get up here and qualify as an expert and over our strengh of objection as to relevancy, testify about their opinion,. But in addition to all the other grounds this is blank hearsay. We're not purported rights to cross examine the person. If the person were under sworn affidavit, there's no exception to the hearsay rule It allows an opinon like this to come in [586] without being cross examined in estimate. And so there are numerous reasons why this is improperly offered.

BY THE COURT: Well, it's not admissible for the purposes of trial. If you – at the conclusion of the trial I'm going to ask you for a brief anyway, if you want to incorporate the cases in it that's part of your argument, then that might be proper, but right now it's admitted. Objection is sustained.

MR. SLAUGHTER: Your Honor, if I might just say one thing. Under Section 201 I think it would be a subject such as this case. Would you take judicial knowledge? It is my distateful determination by resort to sources if this accuracy cannot reasonably be questioned. It was filed with the Supreme Court. We think, as opposed to just a general objection, we think it comes under Rule 201 –

BY THE COURT: Let me – I don't mean it [587] comes into evidence though I think it may be admissible for purposes of argument just like what you stand up is an argument. You can't very well take a brief and have it admitted into evidence.

MR. SLAUGHTER: Right. The only point I'm making though, Judge, is that you can take judicial knowledge of the position taken by the U.S. Government in the earlier case. That is the subject of using this table.

BY THE COURT: I could if it were relevant to any of the issues but –

MR. DAUPHIN: It is relevant in that if this was disposed of by the Supreme Court. They've spoken plainly on that. They've painted the judges of the 11th circuit with respect to Buck Act and 4 USB-111 issues and remanded the case –

BY THE COURT: But not anyone except those two federal judges.

[588] MR. DAUPHIN: No, in general for federal employees because they're not treating federal judges and different from other federal employees. And they remanded the case – they vacated completely the judgment of the 11th Circuit and remanded the case, on one issue only, and that is whether the Federal Court even had jurisdiction of the case under the Tax Injunction Act. So they have, in the federal judges' case, disposed of the so-called Buck Act.

BY THE COURT: Yes, go ahead and hold your argument and I'll look at it, but I don't think it's proper at this time.

Q. All right. Mr. Strickland, I've given you a copy there of the state license code. It's in a book which both parties have been using for purposes of convenient reference to that Code during this trial. If you could turn to page 817, which is where that begins, and then turn over a couple of pages to Section 40-1249 [589] Attorneys. On the basis of schedules already admitted into evidence, the Plaintiffs' have questioned the fact that certain banks seem to pay occupational taxes on 100 percent of their employees and other banks do not pay occupational tax on 100 percent of their employees.

MR. DAUPHIN: That's improper.

MR. SLAUGHTER: I was attempting to establish a –

BY THE COURT: Is that an objection?

MR. BAXLEY: What he's objecting is in pursuing facts not in evidence because what he – it's not admissible, not properly phrased – it's also erroneous by saying we have questions that some banks paid 100 percent and other banks pay less than 100 percent, when all banks pay 100 percent. Well, what we questioned was if banks pay on 100 percent, insurance companies should pay no less than 100. They both have general counsels.

[590] BY THE COURT: Do you have an opinion?

MR. DAUPHIN: I will accept his characterization of the evidence.

BY THE COURT: All right. Will you rephrase the question?

Q. Can you think of any reason why a bank that employs attorneys would be paying the occupational tax or deducting the occupational tax on such attorneys and the attorneys would accept the payment of the occupational tax coming out of their paychecks?

MR. BAXLEY: Objecting to his thinking of any reasons. Yes, it's an improper –

BY THE COURT: Yes, sustained.

Q. Are there any reasons why that situation might exist?

A. There are.

Q. What would they be?

A. Well, we've had situations arise where what we call in-house attorneys for large corporations in this community where the individuals would be performing different functions. One individual might be going to Court. One individual might [591] never go to Court. Another individual might be limited in the particular type of activity that he performed, albeit legal, in house. We had to examine these – many of them – on a case-by-case basis. The result was pretty much that we consulted with the State Bar Association and if the State Bar Association required that particular individual to have a state attorney's license, I don't believe we went behind that.

Q. You say required.

A. Yes. In order to carry out the function that he was performing.

Q. What if a lawyer just wanted to buy the license and stay registered as a lawyer?

A. Well, we had, in the beginning, I think we had many individuals in this community who had lawyering and did not practice law. They were not engaged in the practice of law who attempted to buy a business license or by active attorney's licenses in order to escape the occupational tax. And I think that we successfully dealt with that and rejected those claims in a number of cases.

[592] Q. Can you read the first sentence of Section 40-1249 –

MR. BAXLEY: Object. The best evidence is already in evidence and has been read too many times.

BY THE COURT: Overruled. Go ahead.

A. Each attorney engaged in the practice of law shall pay an annual license tax for the state but none for the county.

Q. So this tax is imposed on attorneys who practice law.

A. Correct.

Q. Did you derive your definition of the practice of law and conception of the practice of law for the purpose of this implication from the confrontation with the State Bar?

A. In conjunction with them, certainly.

Q. And could you characterize what constitutes the practice rather than just being a lawyer who doesn't practice as an employee of a company?

A. I think that term was defined in the state attorney license law and it covers – I think [593] there's examples in there – it certainly includes the individual who goes to Court. It includes individuals who hold themselves out to be a practicing attorney. It would include individuals who render legal advice as an attorney, saying I am an attorney rendering legal advice. I think there are a few exclusions like attorneys who are doing something on their own, for their own behalf, or something which they have a substantial personal equity in.

Q. You said the state license law. Do you mean 40-1249 or do you mean –

A. I mean other state law dealing with attorneys.

Q. All right. Can you turn to page 831? I'll direct your attention to Section 40-1271, Certified Public Accountants. Does the occupation tax, according to your interpretation, apply to a certified public accountant who works for a corporation and who has no other clients or a governmental agency or any or entity?

A. On his salary from that employer-employee relationship, than yes.

[594] Q. What must a certified public accountant do in order to be exempt from the occupation tax?

A. A portion of his compensation is directly a product of his having been engaged in the practice of public accounting, would be exempt from the occupational tax.

Q. Now, do you have Exhibit – the exhibit before you, the pink folder there, which deals with the county business license tax? Could you turn to page 18 and I direct your attention to Section 89, Real Estate Salesmen.

A. Yes.

Q. Could you read that section?

A. 89, Real Estate Salesmen, each person employed as as real estate salesman licensed under the provisions of Title 34-2730 shall pay an annual license amount of $25.

Q. Suppose I am a sales representative of a real estate company and I ply my trade but I have a relationship with him that, for general legal purposes, the federal income tax law, state income tax law, etcetera, is not that of the [595] employee-employer relationship, but that of an independent contractor? I handle my own benefits. Would I pay the county occupation tax on my earnings as such independent contractor?

A. No.

Q. Let's reverse things. Let us say, in the hypothetical, that I am an employee for federal income tax purposes, but I'm still working on commission but I get some compensation

that's not commission that is not commission-based. I have some benefits for purposes of, say, social security deductions, I would be an employee. In that case do I pay an occupational tax on my wages?

A. Yes.

Q. How do you interpret this phrase "each person employed as a real estate salesman"? Does that describe an employee or does it describe an independent contractor?

A. It's an independent contractor.

Q. Why is that?

A. Well, this is the business license code and it [596] covers the individuals who, in the case you outlined in your question, are what we would call indepdendent contractors or proprietors. They are individuals who are not in the true employer-employee relationship.

Q. But the wording here says employed.

A. Well that word doesn't mean – it's not intended to mean as an employee. It means like carrying out the functions. Well, the gentleman who's employed as a court reporter right now, he's performing a function It doesn't mean he's an employee in the traditional sense of employer-employee.

Q. That explanation appears to stress the word "as" and am I understanding you correctly?

MR. BAXLEY: We object. How in the world can he answer whether Mr. Slaughter understands him correctly or not.

Q. Let's try again. I understand your example of the court reporter. How do you as a interpretor of legal language

read into this language that a person employed as a real estate salesman, as [597] an independent contractor but working under the name of a real estate company, is not an employee?

A. Well, to determine if someone is an employee, you would apply the traditional elements of an employment relationship.

Q. Well, what is it in this language that entitles you to say if he satisfies the incidents of an independent contractor, that he's not employed by the real estate company?

A. I'm saying he's performing as a real estate salesman. It's tantamount to saying engaged as a real estate salesman.

Q. All right.

MR. SLAUGHTER: No further questions.

BY THE COURT: Mr. Baxley, any questions?

MR. BAXLEY: Yes, sir, Your Honor.

EXAMINATION BY MR. BAXLEY:

Q. Andy, are you telling the Court that a lawyer who is employed as a general counsel for a large corporation, that devotes his or her full time to commenting on legal matters and their effects for their captive client, but never goes [598] to Court and never signs a pleading, are you telling this Court that those lawyers are not engaged in the practice of law?

A. No. I'm saying that we have to examine those situations on a case-by-case basis as they are presented to us. We would look at the facts. We would look at exactly what the individual is doing, what his responsibilities are, and we would also look at what his – what is his situation with the State Bar itself.

Q. All right, now –

A. We would be persuaded by the conditions of the State Bar as to whether or not he was engaged in the practice of law.

– Q. Are you acknowledging or admitting that you have some in-house counsel that pay the occupational tax and some that don't pay it?

A. That's my understanding, yes.

Q. And yet these in-house counsel have the same exact identical law license with the State Bar, don't they?

A. Well, I can't generalize. That calls for a general [599] statement and I can't generalize. I think that there are – it's been several years since we – since I've been involved in a problem with this – but in the beginning we had some attorneys who had been performing in the corporation situation as an in-house lawyer who were not members of the State Bar and who – whatever they were doing – and then when the occupational tax was passed, they went down and purchased a State Bar license. The State Bar was happy to sell them a license, of course, if they were qualified and eligible. And the State Bar was not looking at the relationship in the same way that we were. So there was an educational process and a dialogue that went on between us and the State Bar about this problem. We were both searching for the right answer in each case. And I think the bottom line is that in – and I don't know what the numbers are, Mr. Baxley – the bottom line is that there are probably still today in in-house situations are people who are attorneys who are not members of the State Bar and there [600] are people who are attorneys who are members of the State Bar. And the ones who are we probably have gotten to the point

where we accept the State Bar's characterization of their having required to buy that license to carry on the function of their performance.

Q. I don't want to cut you off, Andy, but I think my question was simple. Don't the in-house lawyers that do pay the occupational tax have the same license that the in-house lawyers that don't pay it have?

A. I don't think I can give you a general answer to that! There may be in-house lawyers that don't have the license.

Q. Okay.

A. That's what I'm saying.

Q. Assume that they have a license to practice law in the state – the same license that you and I have. It's identical to what a – strike that. I'll ask you – I'll put it this way. Are you acknowledging that an in-house attorney that has a license pays the tax and other in-house attorneys [601] that have the same license, don't they?

A. There may be situations like that.

Q. And –

A. Excuse me. Let me amplify that. There may be individuals whose compensation is related to different functions. For instance – hypothetically, I don't know – hypothetically there may be employees in corporations that have a very multiple roles or some business that might be apart from legal activity and part might be From other activities. The other activity would be taxed.

Q. Do you have in-house legal attorneys that do nothing but legal work that have a state law license that pay the tax and other in-house attorneys who do nothing but legal work that have a state license that don't pay it?

A. I don't know that. I don't the facts of the cases you're talking about.

Q. What do you know of that the in-house attorneys trust department of the big banks do that does not include legal work?

[602] A. Well, at the outset, we don't make the initial determination. At the outset, it's the employer who makes the determination as to whether he will deduct front that particular employee's wages the occupational tax. So, if the employer does so, and pays the occupational tax to the county and the employee lawyer doesn't come in and challenge that, we don't know it. We don't have a case on that. We don't have any knowledge of the facts on that.

Q. Let me ask you this. In your situation, you are the county attorney.

A. Right.

Q. Are you employed by the county?

A. Yes, sir.

Q. Are you under civil service protection?

A. No.

Q. Are you allowed to have outside clients?

A. I have. There's no prohibition against it. I just don't have time.

Q. Okay. But your not prohibited from having outside clients?

[603] A. Right.

Q. But you don't have any now?

A. No.

Q. When was the last time year-wise that you did any work that was not related to your employer's account?

A. Well, I've done work, I just haven't charged.

Q. That you charged for.

A. I'd say several years. I don't know.

Q. Well, before 1987?

A. In one or two situations since '87.

Q. Where you charged a fee for representing somebody?

A. Yes.

Q. Okay. Have you – are you covered by your title through Jefferson County?

A. Yes.

Q. Does Jefferson County pay your social security taxes, their share of it?

A. Yes.

Q. Are you covered by unemployment and other benefits with Jefferson County?

A. Yes.

[604] Q. Do you have a regular law license to practice with the State of Alabama State Bar Association?

A. Yes.

Q. And you've been – through that law license, you can walk into Court in Mobile and try as many criminal or civil cases you choose, right?

A. Yes.

Q. And you could do the same in Huntsville at the other end of the state.

A. Right.

Q. Even though you're employed by the county?

A. Right.

Q. Okay. And are you paying the occupational tax?

A. Not to the county.

Q. You're not paying the county occupational tax?

A. No.

Q. Okay. That's because you have this law license with the state Bar Association?

A. That's because the occupational tax doesn't apply. There's no part to tax the attorney unless he practices law.

Q. Okay. Do you personally pay the license fee with [605] the State Bar or does the county pay it for you?

A. I paid it for many years and I believe right now the county is paying for it.

Q. Okay. Goes the county send it in for you?

A. I think so.

Q. How many employees are there – attorneys – in Jefferson County?

A. There are three total.

Q. Now, when Mr. Slaughter, was asking you about the Birmingham Occupational Tax, and he mentioned – either he or you or both of you mentioned "tied in with Birmingham by Act 406". You're not telling this Court that the City of Birmingham, on their occupational tax, exempts all these professions that the county exempts, are you?

A. No.

Q. And when Mr. Slaughter asked you about our Exhibit 7, he showed you the county license code –

A. Business code?

Q. Business code, on page 18, Section 89, where it reads "real estate salesmen – each person employed as a real estate salesman licensed under the [606] provision of Title 34-27-30, shall pay an annual license amount of $25". That's all it says, right?

A. Right.

Q. And so you're saying that employed doesn't mean employed?

A. I'm saying that if this reaches those real estate salesmen who perform as what I would call independent contractors. They're not employees.

Q. Okay.

A. Of an employer.

Q. All right. Well, in the very next section, Section 90 – Insurance Agents. Tell the Court, please, how a fire and marine

insurance agent is different from a life or health or casualty – well, life or health insurance agent?

A. I'm not really capable of explaining that. I can say that the Code of Alabama and the Legislature through the Code chose to distinguish between fire and marine and others. Why they did that I don't know. But they tax a separate tax provision and separate statutes that apply to insurance situations [607] as to whether they're fire and marine and not fire and marine.

Q. Andy, I'm going to show you what's marked Plaintiffs' Exhibit 6 and Plaintiffs' Exhibit 7. Plaintiffs' Exhibit 6 was the first license code for Jefferson County dated September 29, 1987. Is that right?

A. That's correct.

Q. Okay. Plaintiffs' Exhibit 7 is the license code the superceded 6 and was adopted September 12, '89, wasn't it?

A. Right.

Q. Okay. Now, in Plaintiffs' Exhibit 6, the first license code, fire and marine agents were not treated from life or health agents, were they?

A. There's no category in Plaintiffs' Exhibit 6 for insurance agents as it's set out here.

Q. Okay. So that was added in between September of '87 and September of '89.

A. I believe so.

Q. All right. Now you just told the Court something about the state law treating fire and marine agents [608]

different. What – don't you know the state law relative to insurance agents didn't change between those years?

A. I don't know that. All right. What knowledge do you have as the county attorney? You're the county attorney – you would be the county – the main county attorney in 1989 and 1987, weren't you?

A. Correct.

Q. What knowledge do you have about how this exemption came into being about the fire and marine agents in '89 that wasn't there in '87?

A. I'm having a problem because I cannot answer your question exactly. My – it's conceivable and possible, but I don't know that these agents were paying under the provision of 5(a) which is the catch-all provision – agents, dealers and other businesses – and that they were then, well, at least, this was broken out as a separate category. But I can't – I haven't been able to find anything that would tell me for certain that's what happened. So fire and marine insurance agents pay 1/40 of [609] one percent of their comalissiors.

A. Under Category 90.

Q. And life insurance and health insurance agents pay one-half of one percent occupational tax on their commissions.

A. Those that are employed in employer-employee relationships.

Q. Okay. Then let me re-ask that. The fire and marine agents that are employed in employer-employee relationships, they pay what?

A. Say again now.

Q. The fire and marine life insurance agents that are in employed in an employee relationship, they pay what?

A. You say fire and marine life insurance –

Q. I'm sorry. Fire and marine insurance agents.

A. Okay. Agents for fire and marine who are not in an employer-employee relationship, would be paying under 90. Now those other insurance agents that are not employed in an employer-employee relationship, I believe would be paying under 5(a).

[610] Q. Are you telling the court that under 90 it has to be at employee relationship?

A. (no response)

Q. Read that –

A. No, not under 90.

Q. All right. It says insurance agents, does it not?

A. Yes.

Q. On each person, firm or corporation engaged in the business of acting as agents for fire and marine insurance companies Shall pay a license of 1/40 of one percent of the gross commission from said business from the previous year.

A. Right.

Q. With a minimum license of $7.50.

A. Right.

Q. Now, where in there does it say it has to be as an employee?

A. That's not what I said. I said he would not be in an employee relationship.

Q. Okay. If an agent for, a fire or marine insurance company was in an employee relationship, what would he pay?

[611] A. If he's a true employee, and he's not otherwise paying under the state business license code, he would pay his occupational tax.

Q. You said he would pay – you said if he was an employee, he would pay the occupational tax?

A. Yes.

Q. Even though it says under Insurance Agents each person, firm or corporation engaged in the business of acting as agents?

A. That's a business. That's the sole proprietor we were talking about. That's the independent contractor, sole proprietor, who is – who has a business.

Q. So is it your testimony that individual agents that are employees do not pay – for fire and marine insurance companies – do not pay ¼ of one percent? They pay the .5 percent?

A. If you'll repeat the question. "It's mixed up.

Q. All right. Let's start from square one and then I'll stop. Do you know if fire and marine agents pay –

A. Do I know what?

[612] Q. Do you know what the fire and marine agents in Jefferson County pay?

A. I can only tell you what this document says.

Q. Well, the document –

A. I wouldn't know one if he walked in the door.

Q. Okay. The document's in evidence, so Section 90 says what fire and marine agents pay.

A. If they are a business as an agent. This is a business license code. If he is – if he is as an agent he is in the business of acting as an agent, and he is not in an employer-employee relationship to someone else, he can buy this license.

Q. Okay. What if he is an employee of someone else? Can the fire and marine agent buy that license?

A. No.

Q. He cannot.

A. No. Not for the duties he performs as an employee.

Q. Okay. What if he is an employee of someone else but he's on commission?

A. Well, the commission is just a form of compensation. That doesn't change anything.

[613] Q. I agree with that but what would he pay the county?

A. Say it again.

Q. If a fire and marine or marine agent is an employee of a company engaged in the business of writing fire and marine insurance –

A. As an employee?

Q. As an employee, but he is paid on commission, what would that agent pay the county?

A. I would assume – I have to assume on your statement of facts – that he's not otherwise covered under something else under state law.

Q. Okay.

A. But if there's a person such as you just described, he should be paying the occupational tax.

Q. Okay.

A. Now, the reason I'm hesitating here is because there are some state laws applicable to fire and marine that you just have to get into and read and try to understand why they make a distinction between fire and marine and other types and there's [614] provisions in there that may – and I hadn't read this in a while – but may indicate that you can perform – for fire and marine you have to do it a certain way. In other words, it's not an ordinary insurance situation and I don't know why.

Q. Okay. I think that's the best answer. You don't know why and we are through.

BY THE COURT: May he step down?

MR. SLAUGHTER: Yes, sir. No further questions.

BY THE COURT: You may step down.

MR. SLAUGHTER: The Plaintiffs rest.

MR. BAXLEY: Well, Your Honor, we will not put up any rebuttal and we'll not recall the witness and we'll not offer any more exhibits except that we would like to say in light of what they've done ask the Court on the pending thing that the Court has about our offer of study. I think it's #1 and we think that it's certainly admissible now. Bear in mind it's a document generated by the county

* * *

JEFFERSON COUNTY COMMISSION
[LOGO]

[Names Omitted In Printing]

MEMORANDUM

DEFENDANT'S EXHIBIT NO. 9

TO: Randy Godeke, Director
Department of Revenue

FROM: Tom Meacham, Sr. Auditor TAM
Department of Revenue

SUBJECT: Statistical Report – Proprietorships

DATE: October 20, 1997

Attached is a statistical report summarizing all sole proprietors purchasing a state or county license for the period of October 1, 1996, through September 30, 1997. This report shows a total of 17,301 licenses issued with the county receiving $292,081 in revenue for the Non-Regulated Professional Licenses. If you include the Regulated Professionals, you would add 7,465 additional licenses and $72,948 additional in revenue.

For the period October 1, 1996, through September 30, 1997, the Department of Revenue issued a grand total of 20,510 State Privilege Licenses, of which the county received $737,950, and 16,223 County Business Licenses in the amount of $2,901,288.

As you will notice, the report does not include the category of attorney. The attorneys remit their annual license

fee directly to the State Bar Association and are not required to purchase a license through the Revenue office.

If you need additional information, please let me know.

WP

Attachment

OTCOURT2.XLS

96-97 Business Licenses issued to Sole Proprietors

Licence Section	License Description	Number Issued	State Amount	County Amount	Total License	**Average Hourly Wage	Total Annual Wage	Total Wages Per Lic Issued	Annual OT
8	Single Store License	2724	2593	0	2593	12.74	26499.20	72183821	360919
41	Abstract Title	1	45	15	60	15.57	32385.60	32386	162
*43	Accountant, Auditor	481	11675	0	11675	18.52	38521.60	18528890	92644
44	Business Machines	47	4250	2125	6375	15.57	32385.60	1522123	7611
45	Advertising	13	1875	938	2813	22.35	46488.00	604344	3022
46	Air Conditioning	19	1850	925	2775	11.72	24377.60	463174	2316
46A	Air Conditioning	2	15	8	23	11.72	24377.60	48755	244
46B	Air Conditioning	8	73	36	109	11.72	24377.60	195021	975
*48	Architect	164	4088	0	4088	21.02	43721.60	7170342	35852
*50	Auctioneer	31	775	0	775	16.57	34465.60	1068434	5342
51	Auto Dealer	470	34083	17041	51124	15.35	31928.00	15006160	75031
53	Auto Accessories	196	4187	2094	6281	13.17	27393.60	5369146	26846
54	Car Repair	472	3230	1615	4845	9.28	19302.40	9110733	45554
55	Car Storage	3	10	5	15	12.74	26499.20	79498	397
56	Car Storage	13	185	92	277	12.74	26499.20	344490	1722
58	Barber	209	1165	583	1748	5.78	12022.40	2512682	12563
60A	Battery	1	15	7	22	13.17	27393.60	27394	137
61	Beautician	647	7669	3835	11504	5.78	12022.40	7778493	38892
62	Bicycles/Motorcycles	10	105	53	158	15.57	32385.60	323856	1619
64	Bond Maker	5	450	225	675	20.06	41724.80	208624	1043
69A	Carbonated Drinks	663	1601	801	2402	6.82	14185.60	9405053	47025
69B	Soda Fountain	290	5663	2831	8494	6.82	14185.60	4113824	20569
70	Soft Drinks/Wholesl	1	50	25	75	6.82	14185.60	14186	71
*71	Certified Pub Acct	689	17088	0	17088	40.14	83491.20	57525437	287627
72	Cigarette, Retail	361	3661	1830	5491	8.57	17825.60	6435042	32175
73	Cigarette, Wholesl	10	700	350	1050	8.57	17825.60	178256	891
75	Cleaning/Pressing	30	333	166	499	6.27	13041.60	391248	1956
75A	Cleaning/Pickup	12	60	30	90	6.27	13041.60	156499	782
76	Coal	3	30	15	45	15.57	32385.60	97157	486
77	Coal Hauling	2	39	20	59	13.02	27081.60	54163	271
79	Coffin	4	270	135	405	15.57	32385.60	129542	648
80	Collection	10	575	288	863	9.70	20176.00	201760	1009

81	Commission Merchan	120	2820	1410	4230	12.74	26499.20	3179904	15900
82	Concert	2	20	10	30	12.74	26499.20	52998	265
83B	Money Lender	1	100	50	150	19.50	40560.00	40560	203
84	Contractor	1979	72695	36348	109043	18.59	38667.20	76522389	382612
87	Manufacturing	69	1300	650	1950	12.54	26083.20	1799741	8999
91	Deli	36	350	175	525	12.85	26728.00	962208	4811
*92	Dentist	281	5197	0	5197	28.16	58572.80	16458957	82295
93	Detective Agency	57	5350	2675	8025	12.46	25916.80	1477258	7386
94	Film Developing	1	5	3	8	16.60	34528.00	34528	173
97	Elect, Gas Appliance	72	940	470	1410	15.57	32385.60	2331763	11659
98	Embalmer	30	290	145	435	16.57	34465.60	1033968	5170
*99	Engineer	345	6820	0	6820	21.02	43721.60	15083952	75420
102	Firework	5	85	43	128	15.57	32385.60	161928	810
104	Fortuneteller	2	60	30	90	16.57	34465.60	68931	345
105	Fruit Dealer	16	113	56	169	15.57	32385.60	518170	2591
106	Gasoline Station	168	11001	5500	16501	6.66	13852.80	2327270	11636
107	Glass Plate Dealer	6	175	88	263	20.36	42348.80	254093	1270
108	Golf Course	2	25	13	38	20.06	41724.80	83450	417
108A	Golf Course	4	55	28	83	20.06	41724.80	166899	834
112	Horse Dealer	1	20	10	30	15.57	32385.60	32386	162
114	Ice Factory	1	35	18	53	15.57	32385.60	32386	162
115	Hotel	13	816	408	1224	12.85	26728.00	347464	1737
116	Junk Dealer	2	40	20	60	20.06	41724.80	83450	417
118	Laundry	46	459	229	688	12.46	25916.80	1192173	5961
118A	Laundry-Hand	2	10	5	15	12.46	25916.80	51834	259
122	Lumber Yard	2	35	18	53	15.57	32385.60	64771	324
123	Machine Shop	27	270	135	405	13.79	28683.20	774446	3872
124	Manicurist	237	1100	550	1650	5.78	12022.40	2849309	14247
125	Mattress Mfg	85	988	493	1481	16.60	34528.00	2934880	14674
*126	Medical Doctor	1867	45873	0	45873	78.85	164008.00	306202936	1531015
127	Mimeographs	2	60	30	90	16.60	34528.00	69056	345
131	Monuments	6	30	15	45	15.57	32385.60	194314	972
133A	Movies	1	60	30	90	15.57	32385.60	32386	162
134	Newstand	38	180	90	270	15.57	32385.60	1230653	6153
*135	Optometrist	88	1925	0	1925	16.57	34465.60	3032973	15165
*136	Chiropractor	60	1200	0	1200	16.57	34465.60	2067936	10340
138	Pawnbroker	14	3500	1750	5250	15.57	32385.60	453398	2267

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140	Photographer	58	783	391	1174	19.83	41246.40	2433538	12168
140A	Photographer	70	675	338	1013	19.83	41246.40	2887248	14436
140B	Photographer	2	7	4	11	19.83	41246.40	82493	412
141	Musical Instruments	2	100	50	150	15.57	32385.60	64771	324
141A	Musical Instruments	1	13	6	19	15.57	32385.60	32386	162
141B	Musical Instruments	8	160	80	240	15.57	32385.60	259085	1295
143	Pistols Revolvers	28	3050	1525	4575	15.57	32385.60	906797	4534
144	Playing Cards	30	60	30	90	12.74	26499.20	794976	3975
145	Plumber	132	1507	753	2260	12.59	26187.20	3456710	17284
145A	Plumber	4	20	10	30	12.59	26187.20	104749	524
146	Pool Table	81	6188	3094	9282	12.74	26499.20	2146435	10732
147	Race Track	1	10	5	15	20.06	41724.80	41725	209
148	Radio	46	552	276	828	15.57	32385.60	1489738	7449
*149	Real Estate	107	1335	668	2003	24.11	50148.80	5365922	26830
151	Restaurant	185	5111	2556	7667	12.85	26728.00	4944680	24723
152	Dance Hall	29	700	350	1050	12.74	26499.20	768477	3842
152A	Dance Hall-Other	2	100	50	150	12.74	26499.20	52998	265
153	Sandwich Shops	128	575	288	863	12.85	26728.00	3421184	17106
*155	Scientist Naturopath	23	230	0	230	27.12	56409.60	1297421	6487
156	Sewing Machines	6	150	75	225	15.57	32385.60	194314	972
156A	Sewing Machines	1	10	5	15	15.57	32385.60	32386	162
158	Shotguns	63	482	240	722	15.57	32385.60	2040293	10201
159	Skating Rinks	1	25	5	30	12.74	26499.20	26499	132
160	Solicitating Broker	16	725	363	1088	22.42	46633.60	746138	3731
161	Eyeglasses	17	324	163	487	15.57	32385.60	550555	2753
162	Stock Broker	5	250	125	375	22.42	46633.60	233168	1166
163	Carnival	1	100	50	150	12.74	26499.20	26499	132
166	Theater	10	195	98	293	20.06	41724.80	417248	2086
167	Ticket Scalper	7	650	325	975	12.74	26499.20	185494	927
168	Tourist Camp	1	15	7	22	12.74	26499.20	26499	132
169	Tractor Road Machine	11	287	143	430	15.57	32385.60	356242	1781
172	Transcient Dealer	45	1003	502	1505	8.57	17825.60	802152	4011
172A	Transcient Dealer	3	10	5	15	8.57	17825.60	53477	267
174B	Retail Peddler	888	15113	7557	22670	8.57	17825.60	15829133	79146
174C	Retail Peddler	10	950	475	1425	8.57	17825.60	178256	891
174D	Peddler	1	100	50	150	8.57	17825.60	17826	89
176	Vending Sales	133	1377	688	2065	8.57	17825.60	2370805	11854

176A	Vending Sales	2			2	8.57	17825.60	35651	178
176B	Vending Sales	48	2390	1197	3590	8.57	17825.60	855629	4278
176C	Vending Sales	1	5	3	8	8.57	17825.60	17826	89
177	Cabinet Shop	79	473	236	709	7.97	16577.60	1309630	6548
*178	Veterinarian	70	350	0	350	16.57	34465.60	2412592	12063
179	Warehouse	1	25	13	38	12.47	25937.60	25938	130
179A	Warehouse	1	100	50	150	12.47	25937.60	25938	130
315	Chain Store	124	1171	0	1171	12.47	25937.60	3216262	16081
	Totals	**15762**	**$319,875**	**$110,436**	**$430,311**			**$728,024,024**	**$3,640,120**

County Ordinance License Issued for 96-97

License Schedule	Description	Number Issued	County Ordinance	Total License	**Average Hourly Wage	Total Annual Wage	Total Wages Per Ord Issued	Annual OT
C2	Advertising	4	525	525	22.35	46488.00	185952	930
C5A	Agents, Dealers	2118	63612	63612	12.74	26499.20	56125306	280627
C5B	Business Office	19	398	398	12.74	26499.20	503485	2517
C6	Aircraft	1	50	50	15.57	32385.60	32386	162
C7	Bookkeeper	98	3923	3923	10.28	21382.40	2095475	10477
C9	Auto Polishing	93	3038	3038	16.78	34902.40	3245923	16230
C9A	Auto Polishing Incide	3	23	23	16.78	34902.40	104707	524
C10	Auto Drive It	1	200	200	15.57	32385.60	32386	162
C12	Bakery	2	100	100	5.94	12355.20	24710	124
C13	Bakery Goods	10	353	353	5.94	12355.20	123552	618
C14	Barber Supplies	9	425	425	15.57	32385.60	291470	1457
C16	Bootblacking	7	50	50	16.78	34902.40	244317	1222
C19	Cemetary	1	25	25	20.06	41724.80	41725	209
C21	Metallurgist Engineers	11	1602	1602	14.31	29764.80	327413	1637
C25	Amusement	1	100	100	20.06	41724.80	41725	209
C27	Court Reporting	33	3380	3380	10.34	21507.20	709738	3549
C29	Curb Market Covered	1	30	30	15.57	32385.60	32386	162
C31	Dental Depot	14	444	444	16.53	34382.40	481354	2407
C32	Insecticides	4	129	129	15.57	32385.60	129542	648

C32A	Exterminators	15	248	248	16.73	34902.40	523536	2618
C33	Dress Shop	140	6090	6090	15.57	32385.60	4533984	22670
C34	Prescription Shop	1	161	161	23.46	48796.80	48797	244
C35	Employment Agency	11	1900	1900	12.45	25896.00	284856	1424
C38	Florist	143	5995	5995	11.75	24440.00	3494920	17475
C40	Guard Patrol	29	460	460	6.40	13312.00	386048	1930
C41	Retail Food Store	219	17854	17854	15.57	32385.60	7092446	35462
C42	Ice Cream	22	383	383	15.57	32385.60	712483	3562
C43	Industrial Traffic Mgr	1	50	50	22.48	46758.40	46758	234
C44	Hospital	4	120	120	20.06	41724.80	166899	834
C45	Inspector	2	45	45	20.64	42931.20	85862	429
C47	Jitneys	1	15	15	14.12	29369.60	29370	147
C48A	Junk Wagon	2	50	50	20.36	42348.80	84698	423
C49	Landscape Gardener	123	3414	3414	20.36	42348.80	5208902	26045
C50	Manufacturing	28	780	780	12.54	26083.20	730330	3652
C51	Retail Merchandise	1618	42021	42021	8.57	17825.60	28841821	144209
C52	Messenger Service	5	48	48	6.74	14019.20	70096	350
C52A	Messenger Service	22	171	171	6.74	14019.20	308422	1542
C52B	Messenger Service	4	96	96	6.74	14019.20	56077	280
C53	Mortgage Loans	16	536	536	19.50	40560.00	648960	3245
C55	Newspapers	16	345	345	16.60	34528.00	552448	2762
C57	Newsboys	2	15	15	5.34	11107.20	22214	111
C59	Oil Wholesale	1	1046	1046	14.12	29369.60	29370	147
C60	Oil Auto Retail	2	45	45	15.57	32385.60	64771	324
C62	Ore Stone Cement	2	60	60	20.36	42348.80	84698	423
C65	Pet Shops	24	345	345	8.57	17825.60	427814	2139
C70	Printing	79	3804	3804	16.89	35131.20	2775365	13877
C71	Repair Shop	213	3795	3795	7.73	16078.40	3424699	17123
C72	School	85	1937	1937	12.45	25896.00	2201160	11006
C75	Tailoring	94	2535	2535	12.74	26499.20	2490925	12455
C76	Taxicabs	6	105	105	12.74	26499.20	158995	795
C77	Tree Pruning	14	278	278	12.74	26499.20	370989	1855
C78	Undertakers	2	230	230	12.74	26499.20	52998	265
C80	Watchmaker	4	53	53	12.74	26499.20	105997	530
C83	Janitorial Service	272	5565	5565	5.76	11980.80	3258778	16294
*C89	Real Estate Agent	1575	38600	38600	21.99	45739.20	72039240	360196
C90	Insurance Agent	38	991	991	22.70	47216.00	1794208	8971

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	C502	Septic Tank	8		[illegible]	[illegible]	[illegible]	42348.80	338790	1694
	C503	Open on Sunday	43		1075	1075	12.74	26499.20	1139466	5697
	C693	Transient Dealer	4		1000	1000	12.74	26499.20	105997	530
*	C900	Real Estate Mun	1684		33680	33680	21.99	45739.20	77024813	385124
		Totals	**9004**		**254593**	**254593**			**286592550**	**1432963**
		Grand Total	**24766**	**$319,875**	**$365,029**	**$684,904**			**$1,014,616,574**	**$5,073,083**
*		**Less: Regulated**					**Average Hourly Wage was furnished by Alabama Dept			
		Professionals	**7465**	**96556**	**72948**	**169504**	of Industrial Relations for the Birmingham Metro Area.			
							Metro area includes Jefferson, Blount, St Clair, and Shelby			
		Net Difference	**17301**	**$223,319**	**$292,081**	**$515,400**	Counties			
							Average Hourly Wage for Jefferson County was furnished			
							by Metropolitan Development Board.			

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DEFENDANT'S EXHIBIT NO. 12

	96-97 Business Licenses issued to Sole Proprietors that are Regulated								
License Section	License Description	Number Issued	State Amount	County Amount	Total License	**Average Hourly Wage	Total Annual Wage	Total Wages Per Lic Issued	Annual OT
*43	Accountant, Auditor	481	11675	0	11675	18.52	38521.60	18528890	92644
*48	Architect	164	4088	0	4088	21.02	43721.60	7170342	35852
*50	Auctioneer	31	775	0	775	16.57	34465.60	1068434	5342
*71	Certified Pub Acct	689	17088	0	17088	40.14	83491.20	57525437	287627
*92	Dentist	281	5197	0	5197	28.16	58572.80	16458957	82295
*99	Engineer	345	6820	0	6820	21.02	43721.60	15083952	75420
*126	Medical Doctor	1867	45873	0	45873	78.85	164008.00	306202936	1531015
*135	Optometrist	88	1925	0	1925	16.57	34465.60	3032973	15165
*136	Chiropractor	60	1200	0	1200	16.57	34465.60	2067936	10340
*149	Real Estate	107	1335	668	2003	24.11	50148.80	5365922	26830
*155	Scientist Naturopath	23	230	0	230	27.12	56409.60	1297421	6487
*178	Veterinarian	70	350	0	350	16.57	34465.60	2412592	12063
	Totals	4206	$96,556	$668	$97,224			$436,215,790	$2,181,079
	County Ordinance License Issued for 96-97								
License Schedule	Description	Number Issued		County Ordinance	Total License	**Average Hourly Wage	Total Annual Wage	Total Wages Per Ord Issued	Annual OT
*C27	Court Reporter	33		3380	3380	10.34	21507.2	709738	3549
*C89	Real Estate Agent	1575		38600	38600	21.99	45739.20	72039240	360196
*C900	Real Estate Mun	1684		33680	33680	21.99	45739.20	77024813	385124
	Totals	3259		72280	72280			149064053	748869
	SUB TOTAL	7465	$96,556	$72,948	$169,504			$585,279,843	$2,929,948

**Average Hourly Wage was furnished by Alabama Dept of Industrial Relations for the Birmingham Metro Area. Metro area includes Jefferson, Blount, St Clair, and Shelby Counties

Average Hourly Wage for Jefferson County was furnished by Metropolitan Development Board.

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*****	Attorney	*3629	0	0	0	48.94	101795.20	369414781	1847074
	*Information supplied by State Bar Assn in Montgomery								
	GRAND TOTAL							$954,694,624	$4,777,022